RETURN DATE: JULY 16, 2019	:	SUPERIOR COURT
TOWN OF NEW MILFORD	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	AT NEW BRITAIN
CONNECTICUT SITING COUNCIL AND CANDLEWOOD SOLAR, LLC	:	JUNE 4, 2019

VERIFIED COMPLAINT

TO THE SUPERIOR COURT IN AND FOR THE JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN, on June 4, 2019, comes THE TOWN OF NEW MILFORD, a municipal corporation organized and existing under the laws of the State of Connecticut, with its principal office at 10 Main Street, New Milford, Connecticut 06776, aggrieved by and appealing from a decision by the CONNECTICUT SITING COUNCIL on April 26, 2019, approving the Development and Management Plan for a project for the construction, operation and maintenance of a 20.0 MV AC Solar Photovoltaic Facility in New Milford, Connecticut, and complains and says:

FIRST COUNT (Administrative Appeal Pursuant to C.G.S. § 4-183)

1. Plaintiff Town of New Milford ("Town") is a municipal corporation organized and existing under the laws of the State of Connecticut, with its principal office at 10 Main Street, New Milford, Connecticut 06776. The Town is aggrieved by the Connecticut Siting Council's decision as more fully set forth below.

2. Defendant Connecticut Siting Council ("Council") is an agency of the State of Connecticut with an address at Ten Franklin Square, New Britain, Connecticut 06051. The Council has jurisdiction over the siting of electricity generating facilities pursuant to

the Public Utility Environmental Standards Act, Chapter 277a of the Connecticut General Statutes (C.G.S. §§ 16-50g through 50ll).

3. Defendant Candlewood Solar, LLC ("Candlewood Solar") is a foreign limited liability company authorized to do business in the State of Connecticut with a business address at 111 Speen Street, Suite 410, Framingham, Massachusetts 01701.

4. On December 21, 2017, the Council issued a Declaratory Ruling to CS, pursuant to C.G.S. § 4-176 and § 16-50k, for the construction, maintenance, and operation of an approximately 20 megawatt (MV) alternating current (AC) solar photovoltaic electric generating facility and associated electrical interconnection at 197 Candlewood Mountain Road, New Milford, Connecticut (the "Project").

5. The Town moved to intervene as a party to the Declaratory Ruling proceeding, and was granted party status by the Council on July 20, 2017.

6. In its decision granting the Declaratory Ruling approving the Project ("Decision"), the Council required CS to submit a Development and Management Plan ("D&M Plan") in compliance with R.C.S.A. §§ 16-50j-60 through 16-50j-62.

7. In the Decision, the Council found, among other things, that the Project generally would comply with applicable water quality standards of the Department of Energy and Protection ("DEEP"). The Council also acknowledged, however, that the Project's stormwater design plans were not complete and required substantial revisions. Specifically, in its Findings of Fact, the Council determined that CS would be required, prior to construction, to "modify the stormwater design to accommodate the proposed revised project" in accordance with the requirements in DEEP's General Permit [for the Discharge of Stormwater and Dewatering Wastewaters from Construction Activities

("General Permit"), DEEP's 2002 Connecticut Guidelines for Erosion and Sedimentation Control ("2002 E&S Guidelines"), the 2004 Connecticut Stormwater Quality Manual ("2004 SWQM"), and DEEP's recommendations as outlined in its "Stormwater Management at Solar Farm Construction Projects" guidelines dated September 8, 2017 ("DEEP's Solar Farm Guidelines"). (Findings of Fact, ¶¶ 196-97; see also Opinion, p. 9)

8. The Council stated in the Decision that the Council "will require final stormwater design plans and its related phasing plan" to be "included in the D&M Plan" showing compliance with the General Permit, the 2002 E&S Guidelines, the 2004 SWQM, and DEEP's Solar Farm Guidelines. (Opinion, p. 9 (emphasis added))

9. On September 17, 2018, CS filed with DEEP an application for registration of the Project under the General Permit.

10. On October 18, 2018, DEEP rejected the registration under the General Permit, citing numerous major deficiencies in the SWMP submitted by CS.

11. On January 2, 2019, Candlewood Solar resubmitted the registration application to DEEP. The renewed registration application attached plans including the following:

- "Stormwater Pollution Control Plan, 20 MW (AC) Solar Photovoltaic Project Candlewood Mountain Road, New Milford, Connecticut, prepared by Wood Environment & Infrastructure Solutions, Inc., dated December 19, 2018" ("SWMP").

- Plans entitled "Candlewood Solar, 20 MW (AC) Solar PV Development, Candlewood Mountain Road, New Milford, Connecticut, For Construction, prepared by Wood Environment & Infrastructure Solutions, Inc., dated December 19, 2018 (26 sheets)" ("Construction Plan").

12. On January 16, 2019, the Town filed with DEEP a petition for declaratory ruling which requested, in part, that DEEP reject Candlewood Solar's renewed request

for registration of the Project under the General Permit. The Town's petition attached a January 14, 2019 affidavit by several members of Milone & MacBroom, Inc., a professional engineering, landscape architecture, and environmental science firm with offices in Cheshire, Connecticut, detailing numerous and significant inadequacies in the SWMP and Construction Plan. Based on their professional experience and review of the plans, the Milone & MacBroom affiants recommended that DEEP reject the General Permit registration and require the filing of an application for an individual permit to discharge, due to the magnitude of the proposed solar facility and its location "on steep slopes ... where a significant area of core forest will be removed .... "

13. On March 14, 2019, DEEP's Bureau of Management and Compliance Assurance ("Bureau") again rejected the proposed registration under the General Permit. For numerous reasons including those set forth in the January 14, 2019 Milone & MacBroom affidavit, the Bureau found substantial flaws in Candlewood Solar's stormwater analysis, and determined that the SWMP "lack[s] elements necessary to demonstrate the effectiveness and appropriateness of the proposed construction and post-construction stormwater management measures."

14. Also on March 14, 2019, DEEP Commissioner Katie Dykes issued a decision not to grant the declaratory ruling requested by the Town. Commissioner Dykes' decision rested on the Bureau's rejection of the registration under the General Permit. The Commissioner noted the "substantial nature and extent of the deficiencies in the registration filing, and expressed doubt that Candlewood Solar "will even submit a revised registration or an application for an individual permit."

15. Because of the Bureau's denial of the Permit registration, and due to her doubts about whether CS will make any resubmission, Commissioner Dykes found it unnecessary to decide on the Town's petition for a declaratory ruling and therefore denied the petition.

16. On January 28, 2019, only a few weeks after submitting its second application to DEEP for registration under the General Permit, CS submitted to the Council its D&M Plan for the Project.

17. The D&M Plan contains the same December 19, 2018 SWMP and Construction Plan that were submitted to and then rejected by DEEP in its March 14, 2019 denial of the General Permit registration.

18. On or about February 28, 2019, the Town submitted to the Council a petition for a declaratory ruling ("Petition"). A copy of the Petition is attached hereto and incorporated by reference herein. The Petition includes two parts and contains two separate requests for relief. In the first part, the Town alleged that 1) the D&M Plan fails to comply with the erosion and sedimentation control and stormwater pollution control standards set forth in DEEP's regulations and guidelines with which the Decision requires the Project to adhere, 2) the D&M Plan fails to address or comply with accepted best engineering practices for controlling sedimentation, erosion and runoff from a project of this massive size and potential environmental disruption, and 3) the D&M Plan is in material conflict with other portions of the Decision. Accordingly, the Town asked the Council to deny the D&M Plan. Pursuant to R.C.S.A. § 16-50j-40(b), the Town further requested the Council to hold a hearing on the Town's petition for a declaratory ruling. The Town contended that "[i]n a project of this scale and with such critical potential

adverse environmental impacts, a hearing is necessary and appropriate to allow interested persons sufficient opportunity to participate in the D&M Plan process and to ensure the completeness and transparency of the Council's review."

19. The second part of the Petition was brought pursuant to C.G.S. § 22a-19, and was verified by Mayor Pete Bass. The Town asserted in this part that the Project will or may unreasonably destroy or impair the public trust in the natural resources of the state, and asked to be made a party or intervenor to the requested declaratory ruling proceeding as well as to the pending application for approval of the D&M Plan. The Town also asked the Council to schedule a hearing on this request.

20. The Town attached as Exhibit C to the Petition a February 27, 2019 affidavit from members of Milone & MacBroom ("Milone & MacBroom Affidavit"). The Milone & MacBroom Affidavit is based on the firm's detailed review of the D&M Plan, and discusses numerous and significant deficiencies and inadequacies of the D&M Plan.

21. On March 7, 2019, the Council issued to CS Set Two (Interrogatories 5-11) of its Interrogatories regarding the D&M Plan. Interrogatory 5 requested CS to "respond directly" to the comments in the Milone & MacBroom Affidavit.

22. On April 4, 2019, CS submitted its responses to Set Two of the Council's Interrogatories. CS's responses to the Milone & MacBroom Affidavit fail to mention that the stormwater analysis and plans CS had submitted to the Council in support of the D&M Plan are the same plans that, just a few weeks earlier, DEEP had rejected in denying registration under the General Permit. In addition, the vast majority of CS's responses indicate that the plans are being revised in numerous and significant respects. CS provided no timetable to the Council for when the revisions will be submitted.

23. On April 22, 2019, the Town submitted to the Council a Supplemental Filing. The Supplemental Filing first alerted the Council to DEEP's March 14, 2019 denial of registration under the General Permit, and argued that unless and until DEEP ever approves a SWMP for the Project, it is premature and unnecessary for the Council to consider the D&M Plan, given the Council's express requirement that the D&M Plan demonstrate compliance with the General Permit registration requirements. The Supplemental Filing also pointed to CS's admissions, in its responses to Set Two of the Council's interrogatories, that the stormwater analysis and plans are being revised in numerous and significant respects, further demonstrating that the SWMP attached to the D&M Plan pending before the Council is materially deficient and nowhere near final.

24. On April 25, 2019--three days after the Town submitted its Supplemental Filing--the Council's staff submitted a Staff Report recommending approval of the D&M Plan and denial of the Petition.

25. Also on April 25, 2019, the Council approved the D&M Plan with the following conditions:

1. Pursuant to RCSA § 16-50j-62, submit the applicable revisions including, but not limited to, the solar array layout, clearing limits, fence design and stormwater management plan for Council review and approval prior to the commencement of construction; and

2. Submit a copy of the Department of Energy and Environmental Protection (DEEP) General Permit and DEEP-approved stormwater management plan prior to commencement of construction.

26. On April 26, 2019 the Council mailed the notice of approval of the D&M Plan to all parties and intervenors of record.

27. The evidence in the record before the Council on the D&M Plan demonstrated that the D&M Plan is defective, unworkable and otherwise not in

compliance with the Decision. Specifically, as set forth in the Milone & MacBroom Affidavit and summarized at pages 6-9 of the Petition:

a. Unsuitability of construction plans.

The plans submitted are not suitable for construction because they "lack detail specific to the conditions on this subject site, are not adequate to allow a responsible contractor to implement the improvements, and do not allow CSC to verify that the improvements have been constructed in accordance with the approved plans." (Milone & MacBroom affidavit, ¶ 5) Without these refined plans, "the impacts of the proposed development cannot be adequately assessed." (Id., ¶5.1; see ¶¶ 5.2 through 5.4)

b. Fundamental flaws in stormwater analysis.

The stormwater analysis is "fundamentally flawed" in the following ways:

- The analysis is based on outdated and underestimated rainfall data. (¶ 6.1)
- No on-site soil testing has been performed to determine if use of proposed surface sand filters will be an acceptable stormwater practice. (¶ 6.2)
- The proposed design fails to comply with requirements in DEEP's Stormwater Quality Manual for stormwater filtering practices. (¶ 6.3)
- New vegetation will struggle to grow under the solar panels due to the panels' density, size, and short height. Thus the DMP's assumption of continuous meadow coverage is improper. (¶ 6.4)
- Certain development peak discharge rates show an increase from predevelopment conditions. (¶ 6.5)
- Runoff will be consolidated and concentrated, fundamentally changing the nature of the discharge to downgradient parcels and creating a long-term risk of erosion and damage to these parcels. (¶ 6.6)
- Design computations for the drainage swales and culverts do not demonstrate that they are large enough to convey stormwater; runoff velocity also is not supported by design calculations. (¶¶ 6.7, 6.8, 6.9)

- The uphill swale across the accessway from Candlewood Mountain Road is likely to cause unprotected erosion across the accessway. (¶ 6.10)

- Calculations for two 18-inch culverts beneath the driveway are not provided. (¶ 6.11)

- The ripraps spillway depth for the sand filter may result in significant reduction of effective storage in the basins. (¶ 6.12)

- There are numerous additional defects in the design of the grading, drainage and site improvements. (¶¶ 6.13 through 6.18)

c. **Inadequacy of phasing plan.**

The phasing plan in the SWPCP (Appendix D to the D&M Plan) fails to adequately address the erosion and sedimentation to be expected from the disruption of 83.4 acres on a steep hillside (¶ 7), in the following respects:

- The plans fail to show how no more than 5 acres at a time will be disturbed before stabilization and prior to installation of the panels. (¶ 7.1)

- There is no metric for determining when the soil has been stabilized. (¶ 7.2)

- The plans call for the clear-cutting of trees as one continuous operation. This will cause soil erosion, but the Petitioner proposes no erosion control measures until after the completion of the entire clearing project. (¶ 7.3)

- The second phase calls for removal of stumps in 5-acre increments, but the locations of those "plots" are not clearly defined and will be left to field survey during construction. The method of grubbing is also unspecified. (¶ 7.4)

- The DMP incorrectly assumes that once germination occurs, the land is stabilized and the 5-acre phase is ready for installation of foundations. In Milone & MacBroom's experience, permanent seed "takes months, not weeks, to develop a root system that can withstand traffic." Milone & MacBroom's expectation is that a full growing season is necessary for the grass to become fully established. Use of a Bobcat to install the foundation screens also likely will tear the grass apart, causing erosion unless the grass is fully established. (¶¶ 7.6, 7.7)

- The plan's proposal to break up the stabilization and construction of the site based on construction watersheds is impractical. Sediment control

measures should include downgradient protections (traps and swales) adjacent to areas of active construction in case actual topographical fill conditions do not match what are shown on the plans. (¶ 7.8)

- Temporary sedimentation traps are improperly shown on the plans. (¶ 7.9)

- The plans propose long slopes of as much as 700 feet, with average slopes exceeding ten percent of disturbed, exposed soil, before installation of any sedimentation control measures. These unprotected long and steep slopes represent a high risk of erosion, and are not allowed by the Connecticut Guidelines for Erosion and Sediment Control. (¶ 7.10)

d. <u>The plans' noncompliance with DEEP's guidelines for stormwater management at solar farm construction projects</u>.

The D&M Plan fails to adhere to DEEP's 2017 "Stormwater Management at Solar Farms Construction Projects" Guidelines:

i. Post-construction hydrology will degrade and exacerbate preconstruction hydrology. (¶ 8.1)

ii. The D&M Plan does not show that the design professional is well versed in erosion and sedimentation guidelines, especially for large construction sites. (¶ 8.2)

iii. The phasing plan lacks sufficient detail, and the timing of the construction activities will result in large tracts of disturbed land with a lack of mature vegetation needed to limit the potential for sedimentation during construction. (¶ 8.3)

28. The evidence before the Council also demonstrates that:

a) CS's representation to the Council, in its declaratory ruling petition for approval of the Project, that tree clearing would be limited to November 1 through March 30, is contrary to the representation in the D&M Plan that its construction schedule "includes tree clearing in the winter/spring .... "

b) Contrary to the Council's requirement in the Decision that CS submit a decommissioning plan, the D&M Plan contains a one-page generic summary of a hypothetical decommissioning plan for a solar project. The D&M Plan i) contains no

evidence of the effectiveness of the decommissioning plan in restoring the over 54 acres of core forest to be destroyed, ii) contains no evidence that CS has any commitments from CS's parent company or from sureties to finance the plan, iii) contains no evidence as to whether the decommissioning plan will include restoration of trees, and iv) contains no evidence showing the specifics or design of the decommissioning as proposed for the Project.

c) The D&M Plan is based on a SWMP and stormwater analysis already rejected by DEEP in its denial of the General Permit registration on the basis of numerous defects.

d) Contrary to the Council's requirement in the Decision, the D&M Plan includes no "final stormwater design plans." To the contrary, CS has admitted that the plans it submitted to the Council are in need of substantial revisions in order to comply with applicable DEEP water quality standards and to address the fundamental flaws found by the Bureau.

e) Given the defects in the General Permit registration identified by the Bureau, and Commissioner Dykes' expression of substantial doubt whether CS will ever submit a revised SWMP to DEEP, the record contains no indication that DEEP's approval of a SWMP--either via a General Permit registration or an individual permit application--is probable.

29. For the reasons recited in paragraphs 27-28 above, the D&M Plan is inconsistent with and in fact conflicts with the requirements in the Decision. The incomplete and defective plans submitted with the D&M Plan fail to show compliance with the Connecticut Soil and Erosion Control Guidelines and other applicable stormwater

design criteria that must be satisfied in order for the Council to permit construction of the Project.

30. The Council's approval of the D&M Plan prejudices substantial rights of the Town because: 1) it violates statutory provisions; 2) it exceeds the statutory authority of the Council; 3) it is based upon factual findings which are made upon unlawful procedure and/or an inadequate and incomplete record; 4) it is affected by other errors of law; 5) it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and/or 6) it is arbitrary and capricious, and/or is characterized by an abuse of discretion and/or it is a clearly unwarranted exercise of discretion, for one or more of the following reasons:

a) The Council ignored the substantial evidence in the record as set forth in paragraphs 27-28, and as such, the approval of the D&M Plan is arbitrary;

b) The Council erred in approving the D&M Plan despite what the Council acknowledged were an incomplete and defective stormwater analysis and SWMP, and in so doing contradicted its own requirement in the Decision that final design plans be submitted with the D&M Plan.

c) The Council erred and/or acted arbitrarily in approving the D&M Plan with a condition that CS submit revised design plans, presumably for staff review only, because such internal review fails to afford the Town and other interested persons a full and fair opportunity to review and comment on any such final plans.

d) The Council erred in approving the D&M Plan conditioned on DEEP's eventual approval of a SWMP for the Project when the record is devoid of any evidence that DEEP approval is probable, and when in fact the record shows that

DEEP has identified numerous substantial defects in the design, prompting DEEP Commissioner Dykes to publicly express doubt whether CS will submit any revised plan to DEEP.

31. The Town is aggrieved by and has standing to pursue this appeal because, as host municipality to the Project, the Town has unique and important interests at stake in the proceedings. Specifically, the Town seeks to protect the interests of its residents in all the various aspects and potential impacts of the construction, operation, and decommissioning of the Project and restoration of associated lands after decommissioning, including but not limited to public welfare, public health and safety, environmental quality, compatibility with land use regulations, stormwater quality, runoff, soil erosion and sedimentation control issues, proposed clearing and associated forestry practices, aesthetics of improvements and/or personal property to be located on the subject property, landscaping standards, the terms and conditions of the SWMP, the D&M Plan, the decommissioning plan, and any other associated plans. The installation of the Project would necessitate the installation of improvements in areas located at elevations above various important ecological assets in the Town, including Candlewood Lake, Rocky River, the Housatonic River, and other wetlands and watercourses.

SECOND COUNT (Administrative Appeal Pursuant to C.G.S. § 22a-19)

1. Plaintiff hereby repeats and realleges paragraphs 1 – 31 of the First Count as if fully set forth herein.

32. For the reasons set forth in paragraphs 27-28, the D&M Plan as approved by the Council is likely to unreasonably impair the public trust in the natural resources of the state, including but not limited to core forestland, wetlands, watercourses, wildlife, and

wildlife habitat. The likely erosion and sedimentation resulting from the defects in the D&M Plan will or may impact the waters of the state and will or may cause harm to downgradient properties, watercourses, water resources, wetlands, and habitats.

33. For the reasons stated in paragraph 31, the Town is aggrieved and has standing to pursue its claim under C.G.S. § 22a-19.

WHEREFORE, PLAINTIFF CLAIMS:

1. A judgment of the Court reversing the Council's approval of the D&M Plan and directing the Council to deny the D&M Plan;

2. Statutory costs;

3. Reasonable attorney's fees to the extent authorized by law; and

4. Such other relief as the Court may deem fair and equitable.

PLAINTIFF,
TOWN OF NEW MILFORD

By: _____

Daniel E. Casagrande, Esq.
Attorney for Plaintiff
Cramer & Anderson, LLP
30 Main Street, Suite 204
Danbury, CT 06810
Phone: (203) 744-1234
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Juris No. 101252

PLAINTIFF'S VERIFICATION

The undersigned, **Pete Bass**, duly authorized Mayor of the Town of New Milford, duly sworn, hereby verifies that the facts recited in the above Appeal are true and accurate to the best of his knowledge and belief.

Subscribed and sworn to before me this 4th day of June, 2019.

PATRICIA HEMBROOK
Notary Public
Connecticut
My Comm. Expires October 31, 2023

Notary Public
My Commission Expires: Oct 31, 2023

RETURN DATE: JULY 16, 2019	:	SUPERIOR COURT
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STATEMENT OF AMOUNT IN DEMAND

The Plaintiff's claim for relief is of a non-monetary nature.

PLAINTIFF,
TOWN OF NEW MILFORD

By: _____

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STATE OF CONNECTICUT

CONNECTICUT SITING COUNCIL

IN THE MATTER OF:	:	**PETITION NO: 1312**
Candlewood Solar, LLC **20 MW Solar Photovoltaic Project** **New Milford Assessor's Map** **Parcels 26/67.1, 9.6, and 34/31.1** **Candlewood Mountain Road** **New Milford, Connecticut**	:	**FEBRUARY 28, 2019**

PETITION FOR DECLARATORY RULING AND FOR PARTY STATUS UNDER C.G.S. § 22a-19

The Town of New Milford ("Town") submits this petition pursuant to C.G.S. §§ 4-176, 22a-19, and R.C.S.A. § 16-50j-38 et seq. The petition is in response to the development and management plan ("DMP") submitted on January 28, 2019 by Petitioner Candlewood Solar, LLC ("Petitioner') for the above project ("Project"). In its December 21, 2017 Final Decision and Order issuing a declaratory ruling approving the Project ("Decision"), the Connecticut Siting Council required Petitioner to submit a DMP in compliance with R.C.S.A. §§ 16-50j-60 through 16-50j-62 for review and approval by the Council "prior to the commencement of facility construction.... " (R. 2531)[1] The Council required that the DMP be served on the Town and all other parties and intervenors on the service list for their comments. (Id.)

This petition is in two parts. In the first part, the Town seeks a declaratory ruling that the DMP 1) fails to comply with the erosion and sedimentation control and stormwater pollution control standards set forth in the Department of Energy and Environmental

[1] Record references (R. ___) are to the record in the pending administrative appeal from the Decision brought by Rescue Candlewood Mountain and other persons. (Docket Nos. HHB-CV-18-6042335-S).

Protection's ("DEEP") regulations and guidelines with which the Decision requires the Project to adhere, 2) the DMP fails to address or comply with accepted best engineering practices for controlling sedimentation, erosion and runoff from a project of this massive size and potential environmental disruption, and 3) the DMP is in material conflict with other portions of the Decision. Accordingly, the Town asks the Council to deny the DMP. Pursuant to R.C.S.A. § 16-50j-40(b), the Town further requests the Council to hold a hearing on the Town's petition for a declaratory ruling. In a project of this scale and with such critical potential adverse environmental impacts, a hearing is necessary and appropriate to allow interested persons sufficient opportunity to participate in the DMP process and to ensure the completeness and transparency of the Council's review. (Part I below.)

The second part of the petition is brought pursuant to C.G.S. § 22a-19(a). The Town believes that the Project will or may unreasonably destroy or impair the public trust in the natural resources of the state, and thus seeks to be made a party or intervenor to the above-requested declaratory ruling proceeding as well as to the pending application for approval of the DMP. The Town also requests the Council to schedule a hearing on this request. (Part II below.)

As to both of parts of the petition, the Town requests the Council to extend the time for approving, disapproving or modifying the DMP beyond the 60-day deadline set forth in R.C.S.A. § 16-50j-60(d), in order to schedule a hearing on the petition and/or conduct further proceedings. In the alternative, the Town asks the Council to disapprove the DMP within 60 days from its filing for the reasons set forth below.

I. **Petition for Declaratory Ruling.**

A. **Name and Address of Petitioner and Petitioner's Counsel; Petitioner's Interest in the DMP.**

Town of New Milford
c/o Hon. Peter Bass, Mayor
10 Main Street
New Milford, CT 06776
Phone: (860) 355-6010
Fax: (860) 355-6002
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The Town has an interest in the DMP and in the declaratory ruling it seeks for the reasons set forth in the Town's July 19, 2017 request for party status in the Council's proceeding on the Developer's petition for approval of the Project. A copy of the Town's request is attached hereto as Exhibit A and incorporated herein by reference.

B. **Notice to Interested Persons.**

Accompanying this petition, as required by R.C.S.A. § 16-50j-40(a), is an affidavit by undersigned counsel for the Town that the Town has given notice of the substance of the petition, and of the opportunity to file comments and to request intervenor or party status under subdivision (c)(1) of R.C.S.A. §§ 16-50j-13 to 16-50j-17, to all persons required to be notified by § 16-50j-40(a) and other persons known by the Town to have an interest in the subject matter of the petition.

C. **Facts and Circumstances Giving Rise to the Petition.**

On or about January 28, 2019, Candlewood Solar, LLC ("Developer") submitted the DMP to the Council. Accompanying the DMP is a Stormwater Pollution Control Plan ("SWPCP") (Attachment D) and a Stormwater Management Plan ("SMP") (Attachment E) prepared by Wood Environmental & Infrastructure Solutions, Inc. ("Wood"). The SWPCP and SMP were submitted as required by the Council as conditions of its December 21, 2017 Decision approving the Project.

The Town intervened as a party to the Council proceeding on the Developer's petition for approval of the Project to raise numerous concerns. In addition, Rescue Candlewood Mountain ("RCM"), an association of individuals concerned about the destruction of core forest and other environmental impacts to be caused by the Project, intervened in the proceeding pursuant to C.G.S. § 22a-19 to oppose the Project due to its significantly adverse effect on the natural resources of the state. RCM and certain other persons adversely affected by the Project timely filed an administrative appeal from the Council's approval pursuant to C.G.S. § 4-183 (the "RCM Appeal"). A copy of RCM's complaint in the RCM Appeal is attached hereto as Exhibit B and incorporated by reference.

Trial of the RCM Appeal in the Superior Court for the Judicial District of Hartford/New Britain (Cohn, J.) commenced on December 4, 2018 and is ongoing as of the date of this petition. The complaint contains detailed factual allegations of the significant adverse impacts on the natural resources of the state, including its core forest, waters and wetlands, that RCM believes the Project will create, due in part to the defects

and inadequacies in the proposed stormwater plan and stormwater pollution control plan submitted to the Council. The Town shares those concerns.

The Town has retained the firm of Milone & MacBroom, Inc. to review the DMP. Milone & MacBroom is a professional engineering, landscape architecture, and environmental science firm with offices in Cheshire, Connecticut. Milone & MacBroom has reviewed the SWPCP and SMP and other plans submitted as part of the DMP. Based on its review, Milone & MacBroom members Vincent McDermott, P.E., Edward Hart, P.E., and Ryan McEvoy, P.E., have prepared an affidavit which describes their numerous and significant concerns about the inadequacies in these plans. A copy of the affidavit ("Milone & MacBroom affidavit") is attached hereto as Exhibit C and incorporated herein by reference.

D. **Statutes and Regulations at Issue.**

C.G.S. §4-176 provides that "[a]ny person" may petition a state agency for a declaratory ruling as to, among other things, "the applicability to specified circumstances of a provision of the general statutes, a regulation, or a final decision on a matter within the jurisdiction of the agency." R.C.S.A. § 16-50j-38 to 16-50j-40 set forth the requirements for a petition to the Council for declaratory ruling. This petition seeks a determination that the DMP conflicts and/or is inconsistent with the requirements and intent of the Decision. As set forth in the Milone & MacBroom affidavit and discussed in detail below, the DMP fails to protect the environment based on numerous deficiencies and inadequacies in the SWPCP and SMP. A declaratory ruling proceeding is a proper vehicle to contest a DMP. See Middlebury v. Connecticut Siting Council, 2002 WL 442383, *2 (2002) (Cohn, J.) (copy attached).

E. Bases for Declaratory Ruling Request.

The Milone & MacBroom affidavit demonstrates that the DMP is defective, unworkable and otherwise not in compliance with the Decision, in the following respects:

1. Unsuitability of construction plans.

The plans submitted are not suitable for construction because they "lack detail specific to the conditions on this subject site, are not adequate to allow a responsible contractor to implement the improvements, and do not allow CSC to verify that the improvements have been constructed in accordance with the approved plans." (Milone & MacBroom affidavit, ¶ 5.) Without these refined plans, "the impacts of the proposed development cannot be adequately assessed." (Id., ¶5.1; see ¶¶ 5.2 through 5.4)

2. Fundamental flaws in stormwater analysis.

The stormwater analysis is "fundamentally flawed" in the following ways:

- The analysis is based on outdated and underestimated rainfall data. (¶ 6.1)
- No on-site soil testing has been performed to determine if use of proposed surface sand filters will be an acceptable stormwater practice. (¶ 6.2)
- The proposed design fails to comply with requirements in DEEP's Stormwater Quality Manual for stormwater filtering practices. (¶ 6.3)
- New vegetation will struggle to grow under the solar panels due to the panels' density, size, and short height. Thus the DMP's assumption of continuous meadow coverage is improper. (¶ 6.4)
- Certain development peak discharge rates show an increase from predevelopment conditions. (¶ 6.5)
- Runoff will be consolidated and concentrated, fundamentally changing the nature of the discharge to downgradient parcels and creating a long-term risk of erosion and damage to these parcels. (¶ 6.6)
- Design computations for the drainage swales and culverts do not demonstrate that they are large enough to convey stormwater; runoff velocity also is not supported by design calculations. (¶¶ 6.7, 6.8, 6.9)

- The uphill swale across the accessway from Candlewood Mountain Road is likely to cause unprotected erosion across the accessway. (¶ 6.10)

- Calculations for two 18-inch culverts beneath the driveway are not provided. (¶ 6.11)

- The ripraps spillway depth for the sand filter may result in significant reduction of effective storage in the basins. (¶ 6.12)

- There are numerous additional defects in the design of the grading, drainage and site improvements. (¶¶ 6.13 through 6.18)

3. **Inadequacy of phasing plan.**

The phasing plan in the SWPCP (Appendix D to DMP) fails to adequately address the erosion and sedimentation to be expected from the disruption of 83.4 acres on a steep hillside (¶ 7), in the following respects:

- The plans fail to show how no more than 5 acres at a time will be disturbed before stabilization and prior to installation of the panels. (¶ 7.1)

- There is no metric for determining when the soil has been stabilized. (¶ 7.2)

- The plans call for the clear-cutting of trees as one continuous operation. This will cause soil erosion, but the Petitioner proposes no erosion control measures until after the completion of the entire clearing project. (¶ 7.3)

- The second phase calls for removal of stumps in 5-acre increments, but the locations of those "plots" are not clearly defined and will be left to field survey during construction. The method of grubbing is also unspecified. (¶ 7.4)

- The DMP incorrectly assumes that once germination occurs, the land is stabilized and the 5-acre phase is ready for installation of foundations. In Milone & MacBroom's experience, permanent seed "takes months, not weeks, to develop a root system that can withstand traffic." Milone & MacBroom's expectation is that a full growing season is necessary for the grass to become fully established. Use of a Bobcat to install the foundation screens also likely will tear the grass apart, causing erosion unless the grass is fully established. (¶¶ 7.6, 7.7)

- The plan's proposal to break up the stabilization and construction of the site based on construction watersheds is impractical. Sediment control measures should include downgradient protections (traps and swales) adjacent to areas of active construction in case actual topographical fill conditions do not match what are shown on the plans. (¶ 7.8)

- Temporary sedimentation traps are improperly shown on the plans. (¶ 7.9)

- The plans propose long slopes of as much as 700 feet, with average slopes exceeding ten percent of disturbed, exposed soil, before installation of any sedimentation control measures. These unprotected long and steep slopes represent a high risk of erosion, and are not allowed by the Connecticut Guidelines for Erosion and Sediment Control. (¶ 7.10)

4. **The plans' noncompliance with DEEP's guidelines for stormwater management at solar farm construction projects.**

The Milone & MacBroom affidavit (¶ 8) demonstrates the numerous respects in which the DMP fails to adhere to DEEP's 2017 "Stormwater Management at Solar Farms Construction Projects" Guidelines:

- For the reasons set forth in paragraph 6 of the Milone and MacBroom affidavit, post-construction hydrology will degrade and exacerbate preconstruction hydrology. (¶ 8.1)

- For the reasons set forth in paragraph 7 of the Milone & MacBroom affidavit, the DMP does not show that the design professional is well versed in erosion and sedimentation guidelines, especially for large construction sites. (¶ 8.2)

- Also for the reasons set forth in paragraph 7 of the Milone & MacBroom affidavit, the phasing plan lacks sufficient detail, and the timing of the construction activities will result in large tracts of disturbed land with a lack of mature vegetation needed to limit the potential for sedimentation during construction. (¶ 8.3)

5. **Summary of DMP Deficiencies.**

Paragraph 9 of the Milone & MacBroom affidavit summarizes the deficiencies in the DMP, and provides:

9. In summary, the plans submitted to the CSC as part of the D&M Plan are inadequate and lack the necessary information to assure that there will not be erosion and sedimentation caused by the construction activities that could impact the waters of the state as noted below.

9.1 Contrary to representations made by the petitioner, the hydrology of the site will be permanently altered and will impact adjoining properties.

9.2 The Candlewood Solar project should be distinguished from other projects that come before the CSC. Whereas transmission line projects, for example, disturb land in a linear manner where impacts from erosion and sedimentation are manageable and stabilization can occur quickly, the Candlewood Solar project will require the clearing, grubbing, and regrading of a large block of land on steep slopes where it will be difficult to manage impacts.

9.2 The establishment of grass cover adequate to prevent long-term erosion will require regrading of the site prior to seeding. The time that it will take to achieve for grass to become well established should be measured in months, not weeks.... [D]eveloping the site in "rolling" 5-acre increments without establishing thick turf before installing the solar arrays is highly likely to cause both short-term and long-term erosion and sedimentation.

9.3 The density of the solar arrays will severely restrict sunlight to the grass beneath the panels and make it very difficult to maintain the grass that will allow for its long-term health,

9.4 If the CSC requires the petitioner to modify and resubmit the plan and supporting documents in accordance with the foregoing comments, it is quite possible that the configuration of the solar arrays will need to be modified and further reduced in number.

6. **Additional Material Conflicts Between the Decision and the DMP**.

Other material conflicts between the Decision and the DMP including the following:

a. **Tree Clearing Schedule**.

Throughout the proceeding on the Decision, and as incorporated in the Decision itself, the Developer represented that "tree clearing would be limited to November 1 through March 30." (Decision, Finding of Fact ¶¶ 248-49, R. 2506) The Developer provided this assurance in order to protect three State-listed NDDB bat species. (Id.)

The DMP, however, states that the Developer is "working with DEEP NDDB on a potential modification to the tree-clearing window." (DMP, p. 8) The Developer acknowledges that DEEP NDDB's Final Determination (DMP, Att. F) requires tree clearing to be limited to November 1 through March 30. (DMP, p. 8) The Developer nevertheless goes on to state that its construction schedule "includes tree clearing in the winter/spring..." (Id.) This is a substantial deviation from the Developer's assurances on the timing of tree clearing; its representations were made in response to concerns voiced before the Council by the Town, RCM, and other environmental groups about the deleterious effects on protected species of clear cutting during certain times of the year. The Council should reject this attempt to revise the tree-clearing schedule.

b. **Decommissioning plan.**

In the Decision, the Council required the Developer to submit a "decommissioning plan" as part of the DMP. (R. 2531) The DMP contains a roughly one-page narrative summary of a generic "process to decommission a PV solar ground mount system." (DMP, p. 6-7) The proposed decommissioning plan should be rejected because it fails to address the concerns voiced by the Town, RCM, other interested persons, and indeed Council members themselves, about the lack of even bare-bones details of the plan.

Specifically, both in the hearing on the Decision and in the DMP, the Developer has submitted no evidence as to the effectiveness of the decommissioning plan in restoring the destroyed core forest areas. No evidence has been submitted that the owner of the Property (who would lease it to the Developer for 20 years) has been consulted or is even willing to agree to the plan. The Developer has submitted no proof that it has commitments or agreements from sureties to secure the plan financially—a

particularly glaring omission given the fact that Developer is a single-purpose entity created solely to lease the Property and operate the Project for its expected 20-year life.[2] Indeed the Developer's representative (Walker) testified bluntly before the Council that Ameresco, its parent, would not agree to commit to fund such a plan. (R. 1379-80)

In the final hearing session before the Council on November 14, 2017, Developer's representatives admitted that: 1) a specific decommissioning plan had not been developed; 2) the Property will be restored in accordance with an as-yet undeveloped plan and the "desires of the owner of the property"; 3) it was undetermined whether the plan would include restoration of trees; 4) as proposed lessee of the property, Developer has no power to agree or object to planting trees as part of the plan; and 5) the proposed Property owner was not a party to the proceeding. (R. 1474-78, 1507-09)

The DMP provides no additional information addressing these points, with one exception--the proposed decommissioning plan contains no provision for restoration of the thousands of trees to be destroyed. Thus the DMP provides no assurances that the decommissioning plan will either be implemented or effective. The circumstances are the same today as they were when the Council approved the Project: First, the decommissioning plan remains largely undefined, with no specifications or detailed plans

[2] To the extent that the Council took any comfort from the PILOT agreement between the Developer and the Town (R. 367-81) that the decommissioning plan would be adequately funded, that reliance was and remains unjustified. The PILOT agreement--which the Council has no authority to enforce in any event--states that a surety bond for the decommissioning plan will be provided to the Town six months before the decommissioning date, i.e. at the end of the Project's proposed 20-year life. (R. 380) Whether the Developer would be able or willing to procure such a bond 19.5 years after the commencement of the Project is pure speculation. Without any presently-in-place financial security and no future revenue stream to fund any such security at the end of the Project, the Developer easily could avoid funding any plan by declaring bankruptcy. The Council's apparent willingness, through its conditional approval, to let the nature and scope of the decommissioning plan be worked out between Developer and the Town, is an impermissible delegation of the Council's statutory responsibility to protect the environment, and is in any event illegal as there is no record proof that the plan (in whatever final form Developer chooses to adopt) will ever be adequately funded. The Council's acceptance of the decommissioning plan offered in the DMP would be equally illegal and unjustified.

describing its design or implementation. Second, the Developer admits it has no power to agree to such a plan. Third, the Developer has submitted no proof that the plan will be funded or secured by someone with the financial wherewithal to ensure it will be carried out 20 years in the future.

Quite simply, an agreement to decommission years in the future is meaningless and unenforceable without solid proof that it is adequately funded now. (See, e.g., R.C.S.A. § 16-50j-94(i)(6) (decommissioning plan for wind turbine facilities must include "financial assurance to ensure that sufficient funds are available for decommissioning the facility").

For these reasons, the Council should reject the decommissioning plan, and require the Developer to submit a plan that provides meaningful details of its design and implementation (including tree restoration), as well as evidence of viable financial funding in place before construction starts, ensuring that this critical environmental resource will be restored when the Project reaches the end of its economic life. The skeletal, unfunded plan proposed by the Developer is a pig-in-a-poke promise that offers no more than illusory protection of the environment.

* * *

In sum, the Town respectfully requests the Council to issue a declaratory ruling rejecting the DMP and requiring a resubmission that remedies the deficiencies pointed out in the Milone & MacBroom affidavit and the other conflicts discussed above. The Town also requests the Council to hold a public hearing on the DMP. At the hearing the Town would submit the testimony of the signatories to the Milone & MacBroom affidavit in support of their professional judgment as to the DMP's inadequacies, as well as other evidence showing conflicts between the DMP and the Decision.

II. Request for Party/Intervenor Status Under C.G.S. § 22a-19.

Pursuant to C.G.S. § 22a-19, any political subdivision may intervene as a party in a state administrative proceeding based on facts alleged in a verified pleading that the proposed activity at issue has, or is reasonably likely to have, the effect of unreasonably polluting, impairing, or destroying the public trust in the air, water, or other natural resources of the state. The Town hereby petitions for party status under § 22a-19 in the proceedings on the declaratory ruling requested in Part I above. (The verification by Peter Bass, the Town's Mayor, of the facts alleged and referred to herein is appended to this petition.)

The Town has a direct interest in the DMP proceeding because it has a duty to protect the public interests of its residents by preventing unreasonable impacts to the natural resources of the State located in New Milford. (See also Exhibit A) Specifically the Town seeks § 22a-19 party status to protect the core forest, watercourses, wetlands, vernal pools, and critical terrestrial habitats which will or may be impacted by the Project.

The Town again incorporates by reference the Milone & MacBroom affidavit and RCM's complaint demonstrating the adverse effects of the Project pertaining to erosion and sedimentation from the construction and maintenance of the solar array, as well as impacts to wetlands, vernal pools and associated critical terrestrial habitats of indicator species dependent on those habitats for survival. (Exhibits B and C) In the event this petition is granted, the Town will present the testimony of the signatories to the Milone & MacBroom affidavit demonstrating the impacts to the natural resources of the state to be caused by implementation of the DMP as proposed by the Developer.

As the Milone & MacBroom affidavit demonstrates, the SWPCP, SMP and related plans submitted with the DMP are wholly inadequate and do not provide assurance that the Project will not cause erosion and sedimentation. As the affidavit specifically details:

- The plans do not show the limits of clear cutting of the 54 acres of core forest to be destroyed, the grading plans do not show how the topography will be regraded after removal of the trees and stumps and before restoration and implementation of site improvements, the plans lack critical details relating to drainage structures customized for this Project, and the proposed solar panels are too close together to allow for adequate sunlight to promote vegetation, all in contravention of customary engineering practice. (See pages 6-8 above.)

- The stormwater drainage analysis is "fundamentally flawed," for numerous reasons, including but not limited to these: 1) the plans are presented based on outdated and improper rainfall data, resulting in a 15-20 percent underestimation of projected rainfall; 2) no on-site soil testing has been performed to determine if surface sand filters are an acceptable stormwater practice; 3) vegetation under the panels will struggle to grow, thus undermining the plan's hydrologic assumptions; post-development peak discharge rates for parts of the site show an increase in runoff from pre-development conditions; 4) the fundamental nature of the discharge from the site will be altered resulting in long-term risk of erosion and sedimentation to downgradient properties; and 5) significant additional design defects and unsupported assumptions further undermine the basis of the design. (See pages 6-7 above.)

- The phasing plan for construction is simplistic and does not adequately address the potential erosion and sedimentation that should be anticipated from the clearing of 83.4 acres on a steep hillside. (See pages 6, 8-9 above.)

The Town seeks § 22a-19 party status to introduce expert testimony and other evidence as outlined above regarding the inadequacy of the SWPCP, SMP and related DMP plans in effectively controlling runoff, sediment and erosion from the Project site, thereby jeopardizing the on-site and off-site wetlands, vernal pools, and CTHs, as well as providing inadequate protection to downgradient properties and water resources.

The bar is quite low for filing an intervention petition, and thus § 22a-19 applications should not be lightly rejected. Finley v. Town of Orange, 289 Conn. 12 (2008) (an application need only allege a colorable claim to survive a motion to dismiss), citing Windels v. Environmental Protection Commission, 284 Conn. 268 (2007).

CEPA clearly and in broad terms indicates that any legal entity may intervene. This includes a municipality and its officials. Avalon Bay Communities v. Zoning Commission, 87 Conn. App. 537 (2005).

An allegation of facts that the proposed activity at issue in the proceeding is likely to unreasonably impair the public trust in natural resources of the State is sufficient. See Cannata v. Dept. of Environmental Protection, 239 Conn. 124 (1996) (alleging harm to floodplain forest resources).

The Connecticut Appellate Court has noted that statutes "such as the EPA are remedial in nature and should be liberally construed to accomplish their purposes." Avalon Bay Communities, Inc. v. Zoning Commission of the Town of Stratford, 87 Conn. App. 537 (2005); Keeney v. Fairfield Resources, Inc., 41 Conn. App. 120, 132-33 (1996). In Red Hill Coalition, Inc. v. Town Planning & Zoning Commission, 212 Conn. 727, 734 (1989), the Supreme Court held that "section 22a-19[a] makes intervention a matter of right once a verified pleading is filed complying with the statute, whether or not those allegations ultimately prove to be unfounded." See Polymer Resources, Ltd. v. Keeney, 32 Conn. App. 340 (1993) ("[Section] 22a-19[a] compels a trial court to permit intervention in an administrative proceeding or judicial review of such a proceeding by a party seeking to raise environmental issues upon the filing of a verified complaint. The statute is

therefore not discretionary."). See also Connecticut Fund for the Environment, Inc. v. Stamford, 192 Conn. 247, 248 n.2 (1984).

The rights conveyed by CEPA are so important and fundamental to matters of public trust that the denial of a 22a-19 intervention petition itself is appealable. See CT Post Limited Partnership v. New Haven City Planning Commission, 2000 WL 1161131 Conn. Super. (Hodgson, J. 2000) (§ 22a-19 intervenors may file an original appeal for improper denial of intervenor status).

The Town's application for party status should be granted so that it may participate by presenting evidence and otherwise meaningfully assist the Council in reaching a decision on the DMP which minimizes the impact to the natural resources of the state.

III. Conclusion.

For the foregoing reasons, the Town respectfully requests the Siting Council to issue a declaratory ruling as described in Part I above, and to grant the Town's request for party status under § 22a-19 as discussed in Part II above. The Town requests the Council to schedule a hearing on both requests to allow the Town to present evidence in support of the petition. The Town also asks the Council to extend the 60-day time limit within which to approve, disapprove or modify the DMP in order to determine the petition, and in the alternative, to deny the DMP within that 60-day period.

Dated: February 28, 2019
Danbury, Connecticut

TOWN OF NEW MILFORD

By: _____

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VERIFICATION

The undersigned, Peter Bass, duly authorized Mayor of the Town of New Milford, duly sworn, hereby verifies that the above petition is true and accurate to the best of his knowledge and belief.

Peter Bass

Subscribed and sworn to before me this 26 day of February, 2019.

Notary Public
My Commission Expires: 3/31/2022

LINDA D. HOLLINS
NOTARY PUBLIC OF CONNECTICUT
My Commission Expires 3/31/2022

2000 WL 1161131

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

CONNECTICUT POST LIMITED PARTNERSHIP,

v.

NEW HAVEN CITY PLAN COMMISSION et al.

No. CV 99043627.

July 21, 2000.

MEMORANDUM OF LAW ON DEFENDANTS' MOTION TO DISMISS

DOWNEY

I

*1 The plaintiff, The Connecticut Post Limited Partnership ("Post"), has appealed a decision by the defendant, The New Haven City Plan Commission ("the CPC"), approving a Development Permit Application by the defendant New England Development (including Site Plan Review, Coastal Site Plan Review and Soil Erosion and Sediment Control Review) for certain off-site improvements to be made in connection with a regional shopping center to be known as the "Galleria at Long Wharf" to be constructed pursuant to a Development Agreement between the Commission and the defendant Long Wharf Galleria, LLC ("Long Wharf").

Post, the operator of a shopping mall in Milford, sought to intervene at the agency level in this, and related, proceedings pursuant to General Statutes, § 22a-19; having filed the verified pleading required by the statute, Post appealed the agency decision pursuant to General Statutes, § 8-8.

Now the defendants have moved to dismiss, asserting that the Court lacks subject matter jurisdiction in that the plaintiff is neither statutorily nor classically aggrieved; that the plaintiff never intervened in the site plan review at issue, and therefore has no standing to appeal the agency decision at issue; and that the appeal was not timely filed.

II

Certain background facts are useful in understanding the positions of the parties: On February 26, 1999, and pursuant to Section 65 of the New Haven Zoning Ordinance ("the Ordinance"), the defendants Long Wharf and New Haven Development Commission submitted an Application and General Plans to the New Haven Board of Aldermen, seeking an amendment of the New Haven Zoning Map to include a Planned Development District ("PDD"). As required by Ordinance, Section 55.B.2, said application included an application for Coastal Site Plan Review. Pursuant to Ordinance, Section 55.B.3, the PDD application and site plan review were forwarded to the defendant CPC for review and recommendations.

On April 14, 1999, the CPC held a public hearing on the application for PDD and Coastal Site Plan Review. On that same date the plaintiff filed a verified pleading with the CPC, pursuant to General Statutes, § 22a-19, seeking to intervene in the proceeding, alleging that the project at issue was reasonably likely to unreasonably pollute, impair or destroy the public trust in the air, water or other natural resources of the state. The CPC denied the plaintiff "intervention and party status" but allowed the plaintiff to testify and submit documents. Following the hearing, the CPC adopted its Report 1268-01, which recommended approval, with conditions, of said application. On August 2, 1999, The Board of Aldermen met and approved the said application and amended the zoning map accordingly. Prior to said meeting, the plaintiff filed a verified petition, pursuant to § 22a-19, seeking party status. The Board refused to conduct a public hearing and refused to allow the petitioner to introduce expert testimony concerning the allegations of the verified petition. The actions of the CPC and the Board of Aldermen are the subject of an appeal pending (CV-99-0430198).

*2 Report 1268-01 required, inter alia, that detailed plans be submitted within 12 months of the effective date of PDD designation.

III

On September 1, 1999, the defendants New England Development and Long Wharf submitted the development permit application which is the subject of this appeal, seeking authorization to undertake certain off-site improvements related to construction of the Galleria

at Long Wharf project. The CPC elected to proceed administratively, without a public hearing, and placed the said application on its agenda for its meeting of September 22, 1999.

On September 21, 1999, the plaintiff sought to intervene in the off-site improvements proceeding, enclosing a copy of its verified pleading filed on April 14th, and claiming said filing provided party status to the plaintiff in the off-site proceeding. The plaintiff also submitted for the record written materials, including a report based on a review of the materials submitted in support of the application relating to off-site improvements.

At its meeting of September 22, 1999, the CPC voted to deny the plaintiff's petition to intervene "since the allegations of the Verified Petition to Intervene do not pertain to the matters scheduled for consideration at this meeting." (Minutes of Meeting, September 22, 1999.) The CPC proceeded to approve the off-site development permit with conditions and notice of its decision was published on September 30, 1999. The plaintiff filed its appeal to this court on October 13, 1999.

IV

A motion to dismiss properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court, *Gurliacci v. Mayer*, 218 Conn. 531, 544. Here, the defendants claim this court lacks subject matter jurisdiction because the plaintiff lacks standing to appeal the CPC's September 22, 1999 decision on the off-site improvements application. When ruling on a motion to dismiss, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader, *Lawrence Brunoli, Inc. v. Branford*, 247 Conn. 407, 410-11 (quotation marks omitted).

General Statutes, § 22a-19 provides that "any person" may "intervene as a party" in "any administrative, licensing or other proceeding, and in any judicial review thereof made available by law" "on the filing of a verified pleading asserting that the proceeding or action for judicial review involves conduct which has, or which is reasonably likely to have, the effect of unreasonably polluting, impairing or destroying the public trust in the air, water or other natural resources of the state." An intervening party, however, may raise only environmental issues, *Red Hill Coalition, Inc. v. Conservation Commission* (citation omitted), 212 Conn. 710, 717. Section 22a-19 must be read in connection with the legislation which defines the authority of the particular administrative agency and is not intended to expand the jurisdictional authority of an administrative body whenever an intervenor raises environmental issues, *Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn., 247, 250.

*3 One who intervenes pursuant to § 22a-19 in an administrative agency proceeding has standing to appeal the environmental issues associated with that agency's decision, *Branhaven Plaza LLC. v. Inland Wetlands Commission*, 251 Conn. 269, 276, n. 9.

A non-party in an administrative agency proceeding does not have standing to initiate an appeal from that agency's decision when no party to the agency proceeding has done so. *Hylen Davey v. Planning & Zoning Commission*, 57 Conn.App. 589, 591.

This Court must determine whether one who sought intervenor status in an administrative agency proceeding, pursuant to § 22a-19, and was denied intervention by said agency, has standing to initiate an appeal of that agency's decision on the application the subject of said proceeding. This Court's answer is "Yes, provided the plaintiff complied with the requirements of § 22a-19; intervenor status was improperly denied; and the authority of the agency concerned extends to environmental issues. Because the defendants have failed to establish their claim that the plaintiff lacks standing to initiate this appeal, and for reasons stated below, the Court will deny the defendants' Motion To Dismiss.

V

In support of their motion to dismiss, the defendants assert that the plaintiff lacks standing to bring this appeal because the plaintiff failed to intervene in the CPC's proceeding regarding the off-site improvements application. The defendants assert that the plaintiff claims that it acquired intervenor status in the off-site improvements proceeding by virtue of its filing of a verified petition on April 14th to intervene in the PDD proceeding. The defendants reason that the PDD

proceeding and the off-site improvements proceeding were two separate and distinct proceedings and the filing of a verified petition in the former could not bestow intervenor status to the plaintiff in the latter. The defendants cite language in Report 1268-01 (p. 10) to support their contention that consideration of proposed off-site storm water improvements was not part of the PDD proceeding.

In the section titled "Coastal Site Plan Review Finding" the Report states: Additional off-site improvements are proposed, and may require separate applications, but are not part of this review in conjunction with the proposed change in zoning designation from BE to PDD." The section concludes with a condition: "The applicant shall be required to investigate incorporating limited on or near-site wet pond storm water detention." The plaintiff argues that its filing a copy of its verified petition on September 21, entitled it to intervenor status in the off-site improvements proceeding and, consequently, conferred standing on the plaintiff to take the instant appeal. In addition, the plaintiff argues that the April 14th filing of a verified petition provides an independent basis for claiming intervenor status in the off-site improvements application review, as the April PDD review and the September off-site improvements review were parts of a single, unified proceeding. As to the claim that the allegations of the verified petition did not pertain to the matters to be addressed in the off-site improvements review, the plaintiff cites certain allegations of its petition as pertaining to the impacts at issue in the September off-site improvements review, namely:

*4 2c. Immediately adjacent to the subject property is one of the largest intertidal flats in the State of Connecticut. The CCMA policy regarding intertidal flats ... is: "to manage intertidal flats so as to preserve their value ... encourage the restoration and enhancement of degraded intertidal flats; to allow uses that minimize change ... and to disallow uses that substantially accelerate erosion or lead to significant despoliation of tidal flats";

2h. It is reasonably likely that in addition to contaminated sediment being used to fill the site ... facilities within and surrounding the proposed Long Wharf site have contributed to further contamination of the site;

2j. The proposed activity will result in significant cumulative and secondary impacts from storm water run-off from the proposed development which will have the reasonable likelihood of causing unreasonable adverse impacts to the adjacent off-site intertidal flats ...;

The Court notes that Report 1278-01, addressing the off-site improvements application, approved certain off-site storm water drainage improvements as well as construction of a storm water pumping station, all "related to construction of the New Galleria at Long Wharf super regional shopping center ..."

The Court finds that the April PDD review and the September off-site improvements review constituted separate, albeit related, proceedings (as the term is used in General Statutes, § 22a-19) relating to a single project, the construction of the Galleria at Long Wharf. The Court finds that the filing of a verified petition and supporting documents by the plaintiff on September 21, 1999, complied with the requirements of § 22a-19 for intervention as a party in the off-site improvements proceeding and conferred on the plaintiff standing at least to appeal the CPC's denial to the plaintiff of intervenor status in said proceeding.

VI

The defendants argue further that the plaintiff failed timely to appeal the denial to it of intervenor status in the September off-site improvements proceeding. The CPC denied the plaintiff intervenor status on September 22, 1999, when it approved, with conditions, the off-site improvements application. Notice of the CPC's decision was published on September 30, 1999. The plaintiffs filed the instant appeal on October 13, 1999. The defendants claim that the plaintiff had fifteen days in which to appeal the CPC's decision; that the fifteen days began to run from September 22, when the CPU denied the plaintiff intervenor status; and that, consequently, the October 13th appeal was untimely. The defendants cite *Nizzardo v. State Traffic Commission*, 55 Conn.App. 678, 685, in support of their claim. *Nizzardo*, indeed, makes clear that denial of a petition to intervene filed pursuant to § 22a-19, though interlocutory, is nonetheless a final judgment for purposes of appeal, *Id.* at 685 (citation, quotation marks omitted), and that said denial must be appealed within the time fixed by statute. The defendants claim that the plaintiff had fifteen days from denial to it on September 22nd of intervenor status in which to appeal.

*5 The plaintiff argues it complied with the requirements of § 22a-19 and thus was entitled to party status in the proceeding at issue. As a party, the plaintiff claims, it is entitled to take an appeal, pursuant to General Statutes, § 8-8, from an agency decision within fifteen days of the publication of such decision. Unlike § 4-183, which mandates an appeal within forty-five days of mailing or personal delivery of a final decision of an administrative agency, the time limits of § 8-8 are triggered by publication of an agency decision. Section 8-8 provides that an appeal be commenced "within fifteen days from the date that notice of the decision was published as required by the general statutes." The defendants again ask the Court to add by implication "or when a petition to intervene is denied, within fifteen days of such denial." This the Court declines to do. It is true that appeals to courts from administrative agencies exist only under statutory authority, *Raines v. Freedom of Information Commission,* 221 Conn. 482, 489 (citations, quotation marks omitted), and that a statutory right to appeal may be taken advantage of only by strict compliance with the statutory provisions by which it is created. *Id.* (citations, quotation marks omitted). It is also true that a statute should not be interpreted to thwart its purpose, *Page v. Town Planning & Zoning Commission,* 235 Conn. 448, 462 (citation, quotation marks omitted). Environmental statutes are remedial in nature and should be construed liberally to accomplish their purposes, *Zoning Commission v. Fairfield Resources Management, Inc.,* 41 Conn.App. 89, 106 (citations, quotation marks omitted). The purpose of the Environmental Protection Act, § 22a-14 *et seq.,* includes the provision to "all persons" "an adequate remedy to protect the air, water and other natural resources from unreasonable pollution, impairment or destruction," General Statutes, § 22a-15. Moreover, § 8-8(p) provides, "The right of a person to appeal a decision of a board to the Superior Court, and the procedure prescribed in this section, shall be liberally interpreted in any case in which a strict adherence to these provisions would work surprise or injustice." The Court concludes that the defendants have failed to establish that the instant appeal was untimely filed.

VII

The defendants have failed to establish that the CPC's denial to the plaintiff of party status barred the plaintiff from initiating the instant appeal; and failed to establish that an intervenor pursuant to § 22a-19 in an administrative agency proceeding is barred from initiating an appeal, pursuant to § 8-8, from that agency's decision. Admittedly, a threshold question would be whether the agency improperly denied party or intervenor status to the petitioner. Were a court to determine such denial was improper, the parties would contest the merits of the agency decision, limited to the plaintiff's claims of impact of said decision on the environment. The defendants have failed to establish their claim that the Court lacks subject matter jurisdiction over this appeal.

*6 Accordingly, the defendants' Motion to Dismiss is denied.

All Citations

Not Reported in A.2d, 2000 WL 1161131, 27 Conn. L. Rptr. 621

Footnotes

1 In *Nizzardo* the statute was General Statutes, § 4-183 and the time period for appeal was forty five-days after mailing or personal delivery of an agency's final decision.

End of Document

2002 WL 442383
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Connecticut.

TOWN OF MIDDLEBURY et al.,
v.
The CONNECTICUT SITING COUNCIL et al.

No. CV010508047S.
|
Feb. 27, 2002.

Synopsis
Town, citizens group, and environmental organization appealed declaratory ruling by the Siting Council concerning electric generating facility in adjacent town. The Superior Court, Judicial District of New Britain, Cohn, J., held that: (1) limited liability company could hold certificate of environmental compatibility and public need and was not required to apply for transfer to its parent corporation; (2) Council was not required to hold a hearing when approving the development and management plan to decide whether the plant should have been moved; (3) the Council could approve the use of additional water trucks when the supply of natural gas to electric generating facility was suspended.

Appeal dismissed.

West Headnotes (5)

[1] **Declaratory Judgment**
Appeal and Error

Town contiguous to town in which Siting Council permitted an electric generating facility was aggrieved by and, therefore, entitled to appeal Council's declaratory ruling against the town; the town represented the public interests of its inhabitants and suffered an injury due to its issues with the Council's views on who was the proper certificate holder, with the procedure leading to the location of the facility, and with the increased truck traffic.

Cases that cite this headnote

[2] **Electricity**
Generating Facilities in General
Electricity
Environmental Considerations in General

Limited liability company could hold certificate of environmental compatibility and public need for the construction, maintenance and operation of an electric generating facility and was not required to apply for transfer of the certificate to its parent corporation. C.G.S.A. §§ 16-50i(c), 16-50k(a), 16-50k(b).

1 Cases that cite this headnote

[3] **Electricity**
Generating Facilities in General

Siting Council was not required to hold a hearing when approving the development and management plan to decide whether the electric generating facility should have been moved southerly from its initial location; the Council did not provide such a condition in final decision that had been affirmed by the Superior Court and did not condition the permit on relocation.

Cases that cite this headnote

[4] **Electricity**
Environmental Considerations in General

Siting Council's final decision that the Superior Court had affirmed in connection with development and management plan for electric generating facility could not be challenged in connection with Council's decision not to make a move to the south a condition of the certificate of environmental compatibility and public need.

2 Cases that cite this headnote

[5] Electricity
Generating Facilities in General

Siting Council did not abuse its discretion in approving in the development and management plan the use of additional water trucks when the supply of natural gas to electric generating facility was suspended and it burned oil.

Cases that cite this headnote

MEMORANDUM OF DECISION

HENRY S. COHN, Judge.

*1 The plaintiffs [1] appeal from a March 1, 2001 declaratory ruling issued by the defendant, Connecticut Siting Council ("the siting council"), relating to a power plant proposed to be built in the town of Oxford by the defendant, Towantic Energy LLC ("Towantic"). This appeal is authorized by General Statutes §§ 4-176(h) and 4-183 of the Uniform Administrative Procedure Act ("UAPA"). [2]

The administrative record provides the following relevant facts. On December 7, 1998, Towantic filed an application with the siting council for a certificate of environmental compatibility and public need ("certificate") for the construction, maintenance and operation of an electric generating facility primarily fueled by natural gas and to be located in Oxford, Connecticut. In the course of the proceedings, a predecessor of Citizens and Trout became parties and Middlebury became an intervenor. On June 23, 1999, the siting council issued its findings of fact, opinion, and decision and order granting a certificate to Towantic for the facility. (Return of Record ("ROR"), Item 1.)

The siting council found that the proposed project "can be developed in a manner to provide a clean and reliable source of electric generation, minimize community and environmental impacts, and provide economic benefits to the Town of Oxford and the State of Connecticut." (ROR, Item 1, Opinion, Docket No. 192, p. 5.) The opinion continued, "the Council will issue a Certificate for this facility, accompanied by orders including a detailed Development and Management Plan (D & M Plan) with elements designed to protect resources on site and mitigate impacts off site." (ROR, Item 1, Opinion, Docket No. 192, p. 5.)

The siting council in its decision and order approved, pursuant to General Statutes § 16-50p, Towantic's application to construct, operate, and maintain "a 512 MW natural gas-fired combined cycle facility." (ROR, Item 1, Decision and Order, Docket No 192, p. 1.) A certificate, as required by General Statutes § 16-50k, was issued to Towantic, subject to several conditions, including but not limited to: (1.) that the facility be constructed and operated by Towantic; (2.) that the project operate on natural gas, except during curtailment of natural gas when the project may operate on low sulfur fuel oil; and, (3) that Towantic shall develop an emergency response plan drafted in cooperation with local and state public safety officials. (ROR, Item 1, Decision and Order, Docket No. 192, p. 1.)

In addition, one of the elements of the D & M plan in the decision and order required Towantic to set forth:

> A final site plan showing all roads, structures and other improvements on the site. The final site plan shall, to the greatest extent possible, reduce the height of facility in conjunction with the shifting the proposed site, up to 500 feet south, to maximize placement of facility components within the existing field; preserve the existing natural vegetation on the site; and minimize impacts on inland wetlands.

*2 (ROR, Item 1, Decision and Order, Docket 192, p. 1.)

Another element in the D & M plan required Towantic to make:

> Provisions for adequate water supply while operating on oil and for adequate oil storage, unloading, and pumping facilities including tanker queuing and turn-around areas sufficient to allow for the arrival of four trucks per hour, to ensure continuous burn on oil for up to 720 hours per year during natural gas curtailment.

(ROR, Item 1, Decision and Order, Docket 192, p. 2.)

Citizens appealed from this decision and after a hearing, the Superior Court dismissed the plaintiff's appeal on November 14, 2000, concluding that substantial evidence supported the decision of the siting council. *Citizens for the Defense of Oxford v. Connecticut Siting Council*, Superior Court, judicial district of New Britain, Docket No. 497075 (November 14, 2000) (Satter, J.T.R.). Citizens then appealed to the Appellate Court but on May 19, 2001, the appeal was withdrawn. (ROR, Item 4.)

On or about October 20, 2000, Towantic filed its proposed D & M plan. (ROR Item 6.) On November 2, 2000, the plaintiffs petitioned for a declaratory ruling, requesting the siting council to determine, in relevant part: (1.) Whether Towantic was still effectively the certificate holder, or whether Calpine Eastern Corporation ("Calpine") improperly submitted the D & M plan; (2.) Whether the terms of the siting council's final decision were violated in the submitted D & M plan by the failure of the plant to be moved "up to 500 feet south" or whether the certificate was improperly amended; (3.) Whether the water supply plan in the D & M plan was unworkable and improperly submitted. (ROR, Item 8, pp. 1-2, 6-8.)

On March 1, 2001, the siting council approved the D & M plan and made the following relevant conclusions to the plaintiff's requests. First, the siting council rejected the claim that Towantic is not the certificate holder. The siting council determined that Towantic was a valid business entity, its business relationship with Calpine was not illegal and would not hinder enforcement, and Calpine was forthright in documenting its purchase of Towantic with plans to operate the facility under Towantic's name. Second, as to the 500 foot provision in the decision, the exact language was "to the greatest extent possible ... shifting the proposed site, up to 500 feet south, to maximize placement of facility components within the existing field ..." While it was claimed that in the proposed D & M plan the site was not moved to the south by 500 feet, the siting council believed the site compaction and reorientation of facility components in the D & M plan were in compliance with its decision. Third, the decision noted that accommodation had to be made for four trucks per hour delivering oil, if the natural gas supply was interrupted as well as adequate water supply. In the proposed D & M plan, Towantic added an additional four trucks per hour to bring in additional water supplies, due to the inability of the Heritage Water Company to meet Towantic's demand entirely. The additional truck traffic would not be excessive and would only occur infrequently when natural gas is not available.

*3 The plaintiffs again have appealed to this court from the siting council's decision and order on their request for declaratory ruling.[3] The court must first address the issue of aggrievement.[4] The standard for aggrievement has been stated by our Supreme Court as follows: "The fundamental test for determining aggrievement encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest, such as is the concern of all members of the community as a whole. Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the decision ... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected ..." (Brackets omitted; citations omitted; internal quotation marks omitted.) *New England Cable Television Assn., Inc. v. DPUC*, 247 Conn. at 95, 103, 717 A.2d 1276 (1998); see also *Bethlehem Christian Fellowship, Inc. v. Planning & Zoning Commission*, 58 Conn.App. at 441, 447, 755 A.2d 249 (2000) ("[s]tanding is not a technical rule intended to keep aggrieved parties out of court; nor is it a test of substantive rights ...") (citations omitted; internal quotation marks omitted).

[1] With respect to the town of Middlebury, the ten-term First Selectman of Middlebury and Director of Public

Works, Edward B. St. John, testified at the hearing before this court that his town borders on Oxford and that the proposed power plant is just over the border. Middlebury as a contiguous town has issues with the siting council's views on who is the proper certificate holder, with the procedure leading to the location of the facility and with the increased truck traffic allowed under the D & M plan.

Based on his testimony, aggrievement is found for Middlebury. First, it has a specific personal and legal interest as "representative of the public interests of all its inhabitants ..." *Milford v. Commissioner of Motor Vehicles,* 139 Conn. at 677, 681, 96 A.2d 806 (1953); *Guilford v. Landon,* 146 Conn. at 178, 179, 148 A.2d 551 (1959); see also *Cromwell v. Inland Wetlands & Watercourses Agency,* Superior Court, judicial district of Middlesex at Middletown, Docket No. 065192 (September 15, 1993) (Gaffney, J.) (10 Conn. L. Rptr. 92) (standing for two towns that border the regulated activities in question). As to the "injury in fact" requirement, there exists a possibility that Middlebury's interests, as stated by the First Selectman, may be affected due to the siting council's replies to the declaratory ruling, and this is sufficient injury under aggrievement law. [5]

Having resolved the issue of aggrievement, the court will next proceed to consider the merits of the case as raised by the plaintiffs. The court uses the following standard in evaluating the claims: "Judicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [General Statutes § 4-166 et seq. (UAPA)] ... and the scope of that review is very restricted ... With regard to questions of fact, it is [not] the function of the trial court ... to retry the case or to substitute its judgment for that of the administrative agency ..." (Citations omitted; internal quotation marks omitted.) *MacDermid, Inc. v. Dept. of Environmental Protection,* 257 Conn. at 128, 136, 778 A.2d 7 (2001). "This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review ... The burden is on the [plaintiff] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record ..." (Citations omitted; internal quotation marks omitted.) *Id.,* at 136-37, 778 A.2d 7. "Even as to questions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion ..." (Internal quotation marks omitted.) *Id.,* at 137, 778 A.2d 7; see also *Assn. of Not for Profit Providers for the Aging v. Dept. of Social Services,* 244 Conn. at 378, 389, 709 A.2d 1116 (1998) (stating the rule in the context of review of a declaratory ruling).

*4 [2] The plaintiffs' first contention is that the siting council erred in not requiring Towantic to petition the siting council for a transfer of its certificate to Calpine. This argument is based upon an interpretation of General Statutes § 16-50k(a) providing that "no person" may develop a facility without a certificate from the siting council. Under General Statutes § 16-50k(b), a certificate may be transferred, subject to the approval of the siting council, to "a person who agrees to comply with the terms, limitations and conditions contained therein." The word "person" includes "any ... corporation, limited liability company, joint venture ... and any other entity, public or private, however organized." General Statutes § 16-50i(c).

The plaintiffs argue that Calpine's name should be on the certificate and Towantic should seek the approval of the siting council to transfer the certificate to Calpine. The plaintiffs allege that Towantic is merely a shell entity for the real party in interest, Calpine, which prepared the D & M plan. The court rejects this attempt to hold the siting council at fault for not analyzing the structure of a limited liability company after it has received a certificate through the application process. This would vary the explicit language of the statutes quoted above that allow a limited liability company to hold a certificate without limitation as a "person." It has been repeatedly held that the primary rule of statutory construction is that "[i]f the language of the statute is clear, it is assumed that the words themselves express the intent of the legislature; ... and thus there is no need to construe the statute." *Anderson v. Ludgin,* 175 Conn. at 545, 552, 400 A.2d 712 (1978); *Wrinn v. State,* 234 Conn. at 401, 405, 661 A.2d 1034 (1995); *Ferrato v. Webster Bank,* 67 Conn.App. at 588, 592, 789 A.2d 472 (2002). By statute, any limited liability company may become a certificate holder and is not automatically forced to apply for a transfer of the certificate to the parent entity.

The only reason given by the plaintiffs to require Towantic to transfer its certificate to Calpine, is the plaintiffs' concern that enforcement would become more difficult if the subservient entity is left as the operator, and not the ultimate owner. The law does not support this conclusion, as the state and local officials or the siting council may take any action they deem appropriate if Towantic violates its certificate. Enforcement would include seeking to revoke the certificate as well as applying remedies against Calpine. See, e.g., *Baston v. RJM & Associates*, Superior Court, judicial district of Hartford, Docket No. 593189 (June 4, 2001) (Beach, J.) (29 Conn. L. Rptr. at 646) (allowing an action against an individual partner of a limited liability company).

The siting council, based on the record as it existed in Docket Numbers 192 and 492, [6] fully answered the plaintiffs in its March 1, 2001 declaratory ruling: Towantic is a valid business entity, its relationship with Calpine is not illegal, and Calpine fully disclosed its relationship with Towantic to the siting council. Therefore, the court finds that the siting council properly ruled on this issue as raised in the request for a declaratory ruling.

*5 [3] The second issue raised by the plaintiff is that the siting council failed to hold a hearing when approving the D & M plan to decide whether the facility should have been moved southerly from its initial location. They contend that there should have been an amended certification process pursuant to § 16-50*l*(d). However, under General Statutes § 16-50p(d): "If the council determines that the location of all or a part of the proposed facility should be modified, it may condition the certificate upon such modification, provided the municipalities, and persons residing or located in such municipalities, affected by the modification shall have had notice of the application as provided in subsection (b) of section 16-501." This provision is a link to § 16-501(d).

[4] In its final decision (Decision and Order, Docket No. 192), (ROR, Item 1, pp. 1-4), the siting council did not provide such a condition. Instead, the siting council added to its order a directive that the D & M plan contain a final site plan, shifting the proposed site, to the greatest extent possible, up to 500 feet south. (ROR, Item 1, pp. 1-2.) The decision and order of the siting council was affirmed by this court and cannot now be challenged on its decision not to make the move to the south a condition of the certificate. Since the siting council did not condition its permit on relocation, or require further notice or a hearing on location in its order, there was no error in the siting council's merely reviewing the proposed D & M plan for compliance. [7] The siting council logically conclude that the D & M plan sets forth an attempt to contract the facility and to retain existing vegetation as a boundary line, and that this satisfies the requirements of the final decision regarding the D & M plan.

[5] The plaintiffs' final issue is that the D & M plan exceeded its scope by approving Towantic's plan to increase truck traffic to the site. Clearly, the D & M plan functions to "fill up the details" in the siting council's final decision. Cf. *State v. Stoddard*, 126 Conn. 623, 628, 13 A.2d 586 (1940) (legislature may delegate to agency to fill up details). The D & M plan cannot provide a substitute for matters not addressed during the application process. *Westport v. Connecticut Siting Council*, Superior Court, judicial district of New Britain, Docket No. 501129 (June 27, 2001) (Cohn, J.), appeal pending, S.C. Nos. 16600, 16601. Under analogous regulations of the siting council, the purpose of D & M plans for electric transmission lines and communications towers is to help "significantly in balancing the need for adequate and reliable utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state." Regs., Conn. State Agencies §§ 16-50j-60, 16-50j-75.

Here, the decision and order, ROR, Item 1, p. 2, requires Towantic to set forth the means of bringing an adequate water supply to the site, at such time as the power plant must use oil for fuel. Towantic explains in the D & M plan that it cannot supply all water needs by the Heritage Water Company and must use truck water to complete the siting council's requirements. (ROR, Item 6, Tab D, p. 3.) Since the final decision provided for the transmission of water to the site, the siting council did not abuse its discretion in approving in the D & M plan the use of additional trucks to accomplish this directive. The siting council appropriately gave its approval noting that the use of water trucks would not be a great environmental burden and would only occur where the supply of natural gas was suspended.

*6 The court concludes that the siting council has not acted unreasonable, arbitrarily, illegally or in abuse of its discretion in its response to the request for a declaratory ruling.

Therefore, the plaintiffs' appeal is dismissed.

All Citations

Not Reported in A.2d, 2002 WL 442383

Footnotes

1 The plaintiffs are the town of Middlebury ("Middlebury"), Citizens for the Defense of Oxford ("Citizens"), Trout Unlimited, Inc., Naugautuck Chapter ("Trout"), William Stowell, and Mira Schachne.

2 The plaintiff's appeal is from the siting council's declaratory ruling in Docket Number 492, and not from Docket Number 192, approving Towantic's proposed development and management plan ("D & M plan"). (Second Amended, Verified Petition For Administrative Appeal, p. 2.) Towantic contends that the Siting Council did not respond at all to the plaintiffs' request for a declaratory ruling and therefore this administrative appeal is not allowed. Towantic suggests that the plaintiffs' avenue for review is to § 4-175 only, an action for declaratory judgment. The Siting Council's March 1, 2001 response, however, sufficiently replied to the plaintiffs' requests to be considered appealable. Cf *New Milford v. Commissioner of Environmental Protection*, Superior Court, judicial district of Hartford New Britain, Docket No. 547864 (September 19, 1995) (Maloney, J.) (15 Conn. L. Rptr. 571) (commissioner declined to rule as request for declaratory ruling was moot).

3 The plaintiffs raised issues other than the three fully set forth above in their request for a declaratory ruling and made allegations in their petition and amended petitions for an administrative appeal that involved issues other than these three. The plaintiffs only discussed the three issues in their brief, however, and did not discuss any additional issues; therefore, the court considers all other issues to have been abandoned. *Merchant v. State Ethics Commission*, 53 Conn.App. 808, 818, 733 A.2d 287 (1999).

4 The court only analyzes aggrievement under the classical test, and not under statutory aggrievement. Some of the plaintiffs intervened in Docket No. 192 under General Statutes § 22a-19 (environmental intervention). This appeal is taken, however, from the declaratory ruling issued in Docket No. 492, and not from Docket No. 192. Therefore, statutory aggrievement is irrelevant.

5 Given that one of the plaintiffs is aggrieved, it is unnecessary to make an extensive analysis of the other plaintiffs' aggrievement. *Protect Hamden/North Haven from Excessive Traffic & Pollution, Inc. v. Planning & Zoning Commission*, 220 Conn. 527, 529 n. 3, 600 A.2d 757 (1991); *Concerned Citizens of Sterling, Inc. v. Connecticut Siting Council*, 215 Conn. 474, 479 n. 3, 576 A.2d 510 (1990). The individual plaintiff Stowell lives in Middlebury, just across the border from Oxford and the proposed plant; the court finds him aggrieved because he raises the issue of the location of the plant in the D & M plan; Stowell is a member of Citizens and this gives Citizens organizational standing; Trout's concern involves the flow of the Pomperaug River and does not have specific personal and legal interest for aggrievement; and finally Schachne has only a general interest in the environment and does not satisfy the first requirement of the aggrievement test.

6 There is no requirement in the siting council's regulations or the UAPA that the siting council before approving the D & M plan hold further hearings on the matter of the relationship between Towantic and Calpine. See Regs., Conn. State Agencies § 16-50j-40(b) (discretionary to hold hearing in issuing declaratory ruling).

7 The plaintiffs rely on a transcript from the hearing in Docket Number 192 to argue what the siting council had in mind by its order on location. The court must rely only on the actual order, not what might have arisen during the hearing process. On reaching this conclusion, the court does not believe it necessary to address the defendant Towantic's motion to strike the transcript excerpt from the plaintiffs' brief. (Motion to Strike Evidence Outside the Record or, in the Alternative, to Supplement the Record dated January 30, 2002.)

End of Document

EXHIBIT A

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VIA EMAIL ONLY

July 19, 2017

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Melanie A. Bachman, Esq., Executive Director
Connecticut Siting Council
Ten Franklin Square
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RE: Petition 1312 submitted by Candlewood Solar LLC for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 20 megawatt AC (26.5 megawatt DC) solar photovoltaic electric generating facility located on a 163 acre parcel at 197 Candlewood Mountain Road and associated electrical interconnection to Eversource Energy's Rocky River Substation on Kent Road in New Milford, Connecticut

Dear Ms. Bachman:

Notice of Appearance

This firm represents the Town of New Milford, Connecticut (the "Town" or "New Milford") in connection with the above-referenced Petition ("Petition") pending before the Connecticut Siting Council ("Council"). Please accept this letter as a Notice of Appearance by our firm on behalf of the Town in this proceeding and please direct future correspondence to the following counsel for the Town:

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If a more formal Appearance needs to be filed, please let me know.

Application for Party Status

Pursuant to Conn. Gen. Stat. §§ 16-50n and 4-177a, as well as Conn. State Agency Regs §§ 16-50j-17 and 16-50j-40, the Town hereby requests that the Council grant the Town party status in the Petition, with full rights to participate in the proceeding as a party. The proposed 20 MW AC facility (the "Facility") is located exclusively within the legal boundaries of the Town, and the Town seeks to participate in order to protect the interests of the Town and its residents in all the various aspects and potential impacts of the construction, operation, and decommissioning of this Facility and restoration of associated lands after decommissioning, including but not limited to public welfare, public health and safety, environmental quality, compatibility with land use regulations, stormwater quality, runoff, soil erosion and sedimentation control issues, proposed clearing and associated forestry practices, aesthetics of improvements and/or personal property to be located on the subject property, landscaping standards, the employment and utilization of local labor and contractors to the extent possible, the terms and conditions of the Facility's storm water management plan, Development and Management Plan, Decommissioning Plan, and any other associated plans. As the Council may be aware, the installation of the Facility would necessitate the installation of improvements in areas located at elevations above various important ecological assets, including Candlewood Lake, Rocky River, the Housatonic River, and inland wetlands.

The Town can only protect these various interests by participating as a party to this proceeding, and its inclusion as a party will not interfere with the orderly conduct of the proceedings. Indeed, as provided under Conn. Gen. Stat. § 16-50n(a), the Council is required to grant party status to recipients of notice under Conn. Gen. Stat. § 16-50l. These provisions recognize that host municipalities of facilities like this have important and unique interests at stake in such proceedings.

Motion for a Public Hearing

Pursuant to Conn. Gen. Stat. § 4-176(e) and Conn. State Agency Regs § 16-50j-40(b), the Town respectfully requests that the Council schedule and hold a formal public hearing on the Petition and proposed Facility. The proposed Facility has created controversy amongst various Town residents and stakeholders, and the only way the Council can adequately hear and address the interests of the various persons and stakeholders impacted by the Petition and proposed Facility is to conduct an open and fair public hearing on the Petition in accordance with its rules and regulations.

Sincerely,

CRAMER & ANDERSON LLP

By: _____
John D. Tower, New Milford Town Attorney

EXHIBIT B

RETURN DATE: MARCH 6, 2018	:	SUPERIOR COURT
RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE (F/K/A LISA J. KRELOFF), MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC	:	JUDICIAL DISTRICT OF NEW BRITAIN
v.	:	AT NEW BRITAIN
CONNECTICUT SITING COUNCIL AND CANDLEWOOD SOLAR, LLC	:	FEBRUARY 1, 2018

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VERIFIED COMPLAINT

TO THE SUPERIOR COURT IN AND FOR THE JUDICIAL DISTRICT OF NEW BRITAIN AT NEW BRITAIN, on February 1, 2018, come RESCUE CANDLEWOOD MOUNTAIN, an unincorporated association comprised of members as set forth herein, LISA K. OSTROVE (F/K/A LISA J. KRELOFF) AND MICHAEL H. OSTROVE, owners of property at 175 Candlewood Mountain Road, New Milford, Connecticut, and CANDLELIGHT FARMS AVIATION, LLC, a Connecticut limited liability corporation that owns property at 5 Green Pond Road, Sherman, Connecticut, aggrieved by and appealing from a decision by the CONNECTICUT SITING COUNCIL, approving a petition by CANDLEWOOD SOLAR, LLC for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is Required for the Construction, Operation

and Maintenance of a 20.0 MV AC Solar Photovoltaic Facility in New Milford, Connecticut, and complain and say:

FIRST COUNT (Administrative Appeal Pursuant to C.G.S. § 4-183)

1. Plaintiff Rescue Candlewood Mountain ("Rescue"), is an unincorporated association of residents of New Milford and Sherman who organized to collectively appear before the Connecticut Siting Council to voice their concerns about the severe environmental and other impacts which will or may result from the construction of the project that is the subject of this appeal (as described below). The members of Rescue include the individuals whose names are set forth in Exhibit A attached hereto and incorporated by reference herein. At least several of the members are aggrieved by the Connecticut Siting Council's decision as more fully set forth below.

2. Plaintiffs Lisa K. Ostrove (f/k/a Lisa J. Kreloff) and Michael H. Ostrove reside and own the real property and improvements located at 175 Candlewood Mountain Road, New Milford, Connecticut. Lisa K. Ostrove is also a member of Rescue.

3. Plaintiff Candlelight Farms Aviation, LLC ("Candlelight Farms") is a Connecticut limited liability corporation that owns the real property and improvements located at 5 Green Pond Road, Sherman, Connecticut (the "Candlelight Farms Property"). The sole member of Candlelight Farms is Terry McClinch, who is also a member of

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Rescue. Candlelight Farms owns and operates a commercial airport and hangar facility on the Candlelight Farms Property known as Candlelight Farms Airport.

4. Defendant Connecticut Siting Council ("Siting Council") is an agency of the State of Connecticut with an address at Ten Franklin Square, New Britain, Connecticut 06051. The Siting Council has jurisdiction over the siting of electricity generating facilities pursuant to the Public Utility Environmental Standards Act, Chapter 277a of the Connecticut General Statutes (C.G.S. §§ 16-50g through 50ll).

5. Defendant Candlewood Solar, LLC ("Candlewood Solar") is a foreign limited liability company authorized to do business in the State of Connecticut with a business address at 111 Speen Street, Suite 410, Framingham, Massachusetts 01701.

6. On or about June 28, 2017, Candlewood Solar, pursuant to C.G.S. §§ 16-50k and 4-176, submitted a petition to the Siting Council for a declaratory ruling that no Certificate of Environmental Compatibility or Public Need ("Certificate") is necessary for the construction, maintenance and operation of a 20 megawatt (MW) alternating current (AC) solar photovoltaic electric facility on a 163 acre parcel at 197 Candlewood Mountain Road in New Milford (the "Property") and associated electrical connection to Eversource Energy's Rocky River Substation on Kent Road in New Milford (the "Project").

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7. The Project contemplates the clearing of approximately 56.07 acres of currently forested land. Due to the location of the Project, this forest land is part of a much larger block of contiguous, unfragmented forest, which totals 788 acres, mostly lying to the north of the Project site. Such large, unfragmented forest blocks are a valuable and diminishing resource in Connecticut.

8. As depicted in Candlewood Solar's environmental assessment submitted to the Siting Council, approximately 788 acres of contiguous forest is present on and adjacent to the Project area, of which 443 acres are considered "core forest" (as defined by the University of Connecticut's Center for Land and Education and Research's ("CCLEAR") Forest Fragmentation Study). The Project would reduce the area of core forest to 348 acres. The CCLEAR study found that between 1985 and 2006, Connecticut lost 160,960 acres of core forest to development. For this reason, core forest land has been targeted for preservation by the Connecticut Department of Energy and Environmental Protection ("DEEP") as well as the State of Connecticut and its conservation partners including land trusts, municipalities and water agencies.

9. Candlewood Solar submitted the Project in response to the New England Clear Energy Request for Proposals (RFP), a three state solicitation by Connecticut (through DEEP), Massachusetts and Rhode Island. Connecticut solicited and selected

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renewable energy projects pursuant to Section 1(c) of Connecticut Public Act 15-107, An Act Concerning Affordable and Reliable Energy (P.A. 15-107) and Sections 6 and 7 of Connecticut Public Act 13-303, An Act Concerning Connecticut's Clean Energy Goals (P.A. 13-303). After reviewing all the projects bid into the RFP process, DEEP did not select Candlewood Solar's proposal as one of the projects authorized to enter into a long-term power purchase agreement, although the Commonwealths of Massachusetts and Rhode Island did select the Project. None of the electricity to be generated from the Project would be sold to Connecticut based utilities or electric distribution companies.

10. On or about September 6, 2017, Rescue filed with the Siting Council a verified application to intervene as a party to the proceeding pursuant to C.G.S. §§ 22a-19, 4-177a and 16-50n. A copy of the application to intervene is attached hereto and incorporated by reference herein as Exhibit B. On or about September 14, 2017, the Siting Council granted Rescue's application to become a party on all grounds recited in the application.

11. On or about July 19, 2017, the Town of New Milford, Connecticut (the "Town") moved to intervene as a party. The Council granted the Town party status on or about July 20, 2017.

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12. On or about August 1, 2017, DEEP filed a notice of intent to intervene as a party to the proceeding and became a party. Although DEEP later withdrew as a party, the Council's Final Decision and Order in this matter continued to refer to DEEP as a party.

13. On or about August 1, 2017 the State's Department of Agriculture ("DOA") filed a notice of intent to intervene as a party and became a party.

14. On or about August 29, 2017, DEEP moved to dismiss the Petition ("Motion to Dismiss") on the following grounds:

> DEEP has not represented, and will not be representing, in writing that the project that is the subject of the declaratory ruling ("the Project") will not materially affect the status of the land on which the Project is to be located as core forest. Accordingly, pursuant to the provisions of Conn. Gen. Stat. § 16-50k(a), as amended by Public Act No. 17-218, the Siting Council may not approve the Project by declaratory ruling. Rather, the Project, if it is to be approved at all, must obtain a certificate of environmental compatibility and public need in accordance with the provisions of the Public Utility Standards Act, Conn. Gen. Stat. §§ 16-50g et seq. and the Siting Council's Rules of Practice, Regulations of Connecticut State Agencies ("R.C.S.A.") §§ 16-50j-1 through 16-50j-91.

15. In the Motion to Dismiss, DEEP noted that P.A. 17-218, amending § 16-50k(a), provides that the Council may approve by declaratory ruling a "solar photovoltaic facility with a capacity of two or more megawatts, to be located on ... forestland" only if, among other things, [DEEP] "represents, in writing, to the council that such project will

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not materially affect the statue of such land as core forest." The amended statute's definition of "core forest" makes clear that the Project will be located on and will materially affect core forest. Because DEEP refused to make the required representation, it argued that the Council could not approve the declaratory ruling, and that the Project needed to go through the full statutory process of obtaining a certificate of environmental compatibility and need.

16. On September 19, 2017, DOA submitted a memorandum in support of the Motion to Dismiss.

17. On September 28, 2017, the Siting Council denied the Motion to Dismiss on the ground that P.A. 17-218 became effective on July 1, 2017, and therefore did not apply to this proceeding because the Petition had been filed on June 28, 2017. The Siting Council rejected DEEP's and DOA's arguments that P.A. 17-218 was intended to apply to Council proceedings pending on the effective date, and was enacted to require full environmental review of projects that, as this Project does, will have an adverse impact on core forests and agricultural lands in the State.

18. On September 26, 2017, the Siting Council held a public hearing on the Petition at Roger Sherman Town Hall, 10 Main Street in New Milford. It held continued

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public hearing sessions on October 31, 2017 and November 14, 2017 at the Council's office at 10 Franklin Square in New Britain.

19. On December 8, 2017, the Siting Council issued draft Findings of Fact, and required parties to submit comments on the draft and as well as post-hearing briefs by December 14, 2017.

20. On December 14, 2017, Rescue submitted comments and proposed revisions and additions to the draft Findings of Fact.

21. On December 14, 2017, the Town of New Milford submitted a post-hearing brief in which it requested denial of the Petition and proposed revisions and additions to the draft Findings of Fact.

22. On December 21, 2017, the Siting Council issued a Decision and Order (including Findings of Fact and Opinion), in which it ruled that the Project would not have a substantial adverse environmental effect, and meets all applicable United States Environmental Protection Agency and [DEEP] air and water quality standards, and therefore, pursuant to C.G.S. § 4-176 and § 16-50k, the Siting Council issued a declaratory ruling approving the Project.

23. On December 22, 2017, the Siting Council mailed the Final Decision and Order to all parties and intervenors of record.

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24. The evidence in the record before the Siting Council on the Petition demonstrated that:

a) As noted in the letter from Timothy Abbott, Regional Land Protection and Greenprint Director for the Housantonic Valley Association, dated July 26, 2017, clearcutting of 68 acres of forest will devastate a 458 acre area of core forest, and the upland clearcut and industrial development of this size and scale has the potential to negatively impact water quality in the Town of New Milford and region. Some of the area of clearcutting drains into the Housatonic River. Clearcutting will impair the ability of stormwater to absorb and filter groundwater.

b) The Project will have substantial effects on wetlands and watercourses, as shown by the following evidence:

1) A plan to adequately manage stormwater has not been provided.

2) The stormwater management system, as designed, diverts all surface flow, starving portions of the wetland system from existing water flow patterns and surcharging other portions of the wetlands at the outlets.

3) The stormwater calculations and subsequent stormwater management report and plans contain inaccuracies that do not take into account the increases in gravel roadway and installation of solar panels on the Property.

4) The stormwater management plan does not take into account the drip edge erosion and long slope erosion potential.

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5) The proposed perimeter stormwater catchment area and infiltration basins may create a cascading effect from one infiltration/detention basin to the next. In a significant rain storm the system may fail.

6) The Project phasing plan is not realistic, especially in view of the fact that Candlewood Solar has very little, if any, experience with large solar projects.

7) Insufficient detail was provided with regard to the sedimentation and erosion control and stormwater management plans.

8) The Project creates the potential for significant negative impacts to wetlands and watercourses, and to the species (and their habitats) that use the wetlands and watercourses for habitat.

c) The Project is incompatible with public policy, including the following:

1) Public Act 17-218 applies to the Project and should be considered due to the Project's impacts to core forest areas.

2) The Project would not be permitted by the Town of New Milford's Zoning Regulations.

3) Candlewood Solar proposes to encumber twenty acres of active farmland as well as several acres of locally important farmland soils, in conflict with the objectives of the DOA and the New Milford Farmland and Forest Preservation Committee.

d) As pointed out by the New Milford Zoning Commission in its letter to the Siting Council of September 11, 2017.

1) Inadequate buffers being provided to neighboring residential properties resulting in negative visual impacts, as well as noise and potentially dust during construction.

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2) The Project is located within 0.5 miles of the Candlelight Farms Airport and adjacent property which is used in part as a heliport. Glare from the solar panels is a safety concern for the small aircraft using these facilities.

3) Construction traffic, including logging trucks on Candlewood Mountain Road, may cause significant damage to the Town road, requiring the Town to repair road damage, at a potentially significant cost.

4) Construction of the Project may cause significant neighborhood disruption due to increased traffic, noise and parking.

e) Public need for the Project has not been demonstrated.

f) As outlined in the letter to the Siting Council from Starling W. Childs, MFS, dated September 14, 2017: (a) Critical habitat features warrant much more study at the proper times of year in order to fully understand the cycle of seasonal use, and (b) hydrological modelling of the runoff that will be generated given all the additional impervious surfaces has not been provided.

g) Alternate sites, including the Century Brass Brownfield site, were not adequately considered by Candlewood Solar.

h) Historical features such as stone walls, stone bounds, ancient road beds and other archeological resources were not evaluated, recorded or inventoried.

i) A decommissioning plan was not made part of the record. Without such a plan (including adequate bonding in place), the corporate structure and the future

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unwillingness or inability for Candlewood Solar to properly decommission and restore the site once the Project is no longer viable is unaddressed. This renders the Petition incomplete and creates a threat to the natural resources disrupted by the Project.

j) An adequate, accurate and detailed erosion control plan, including a sequencing and phasing plan, was not provided.

k) Additional surveys of state endangered and threatened species should have been completed prior to moving forward with approval.

l) The alternative use of the Property as a 508 unit planned residential community has not been demonstrated to be feasible. Therefore the likely future use of the Property would be for recreational purposes or low density housing, which probably would be permitted by the New Milford Zoning Regulations should the current or future Property owner request a zone change.

m) None of the vernal pools at the site were examined for obligate vernal pool species during peak breeding season.

n) Candlewood Solar did not propose landscape plantings or buffers around the solar facility.

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o) The Natural Diversity Database Preliminary assessment identified nine state-listed species within or near the boundaries of the Project site.

p) The Council on Environmental Quality reviewed the Petition and found the analysis of potential impacts to vegetation and wildlife to be inadequate to enable an informed decision.

q) Rescue was not given the opportunity to review and comment on a revised engineered site plan based on the revised "Photovoltaic Array Layout."

r) The Petition is missing a substantial amount of vital information to determine if it is feasible to construct without causing negative impacts to wetlands, watercourses, and wildlife, including listed species, and wildlife habitat.

s) The Project would primarily benefit Massachusetts ratepayers and electric utility companies based in Massachusetts and Rhode Island, not Connecticut ratepayers or utilities. Connecticut's DEEP did not vote to select the Project as part of the tri-state selection process.

t) The Council's cross-examination of Candlewood Solar's environmental consultants revealed that the environmental review performed by Candlewood Solar's consultants was performed in a manner that understates the Project's detrimental and long-lasting impact on native species, especially those dependent

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on the inland wetland systems located in the Project's immediate vicinity. Contrary to Candlewood Solar's representations, the Project will have substantially adverse environmental effects for all the reasons set forth in the record.

u) Candlewood Solar understated and misanalyzed the Project's visual impact, most importantly of the 30-foot-wide interconnection swath to be cut in an easterly and northeasterly direction down Candlewood Mountain – directly within the viewshed of Candlewood Lake ("Lake") and Lynn Deming Park ("Park") – two of the Town's and region's most important recreational resources. Forest thinning will also occur that will further degrade the Park and Lake viewsheds. The Park's beach, picnic areas, play areas, and parking areas all face the Lake in a westerly direction, looking out upon the opposing undeveloped and wooded hillside in a manner that is an important aesthetic and natural resource for Park and Lake users. Candlewood Solar's proposed interconnection corridor would create a permanent visual eyesore for users of the Park and Lake as well as nearby residents. Yet these impacts were not even analyzed within Section 3.10 of the Environmental Assessment prepared for Candlewood Solar by Amec Foster Wheeler.

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25. For the reasons recited in paragraph 24 above, (a) Candlewood Solar did not show that it meets all applicable federal and state water quality standards, (b) the Project will have a substantial adverse environmental effect, and (c) the Project's impact on contiguous core forest land is inconsistent with the letter and intent of P.A. 17-218.

26. The Final Decision and Order prejudices substantial rights of Rescue as well as its members because: 1) it violates statutory provisions; 2) it exceeds the statutory authority of the Siting Council; 3) it is based upon factual findings which are made upon unlawful procedure and on an inadequate and incomplete record; 4) it is affected by other errors of law; 5) it is clearly erroneous in view of the reliable, probative and substantial evidence on the whole record; and 6) it is arbitrary and capricious, and/or is characterized by an abuse of discretion and/or it is a clearly unwarranted exercise of discretion, for one or more of the following reasons:

a) The Siting Council ignored the substantial evidence in the record as set forth in Paragraph 24, and as such, the Final Decision and Order is arbitrary;

b) The Siting Council erred as a matter of law in concluding that P.A. 17-218 does not apply to the Petition;

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c) The Siting Council erred in concluding that the issuance of the Declaratory Ruling will safeguard the environment and the health, safety, and welfare of residents of surrounding neighborhoods, including Rescue's members.

d) The Siting Council erred in concluding that Candlewood Solar had adequately considered feasible and prudent alternatives to the Project site; and

e) The Siting Council erred in concluding that Candlewood Solar had demonstrated a public need for the Project that outweighs the need to protect the ever-diminishing core forest lands of the State, especially given DEEP's rejection of the Project in the RFP process and its refusal to represent to the Siting Council that the Project will not have an adverse impact on core forest land.

27. Rescue has standing to pursue this Appeal because one or more of its members have personal and legal interests in the subject matter, which interests are or may be specifically and adversely affected and threatened by the Final Decision and Order, in ways that would make out a justiciable case had these members themselves brought suit, including but are not limited to the following immediate or threatened injuries:

a) Member Terry McClinch is the owner of Plaintiff Candlelight Farms, which owns property within a quarter mile of the Project Property at 5 Green Pond Road ("Candlewood Farms Property"). Candlelight Farms owns and operates Candlelight

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Farms Airport ("Airport") at said property. The tens of thousands of solar panels to be installed, which panels are in or near the flight pattern for the Airport, will or may create glare which will be dangerous to the small aircraft that fly into and out of the Airport. This glare may cause pilot disorientation and potential crashes. Local emergency units will have difficulty in fighting a fire caused by a crash in or near the solar array and in rescuing the pilot. Mr. McClinch is a pilot himself who frequently uses the Airport. These safety hazards may cause a reduction in aircraft's use of the Airport with a consequent reduction in value of the property. Also on the Candlelight Farms Property is a large aircraft hangar facility which is sometimes used as a wedding and event center. The solar array will be directly visible to the occupants and visitors to the Candlelight Farms Property, which is prized for its scenic vistas and surrounding unspoiled farm and forestland. The visibility of such a large and unsightly solar array will or may detract from the attractiveness of the property, thus impacting the businesses operated on it and reducing its value.

b) Rescue member Carl M. Dunham, Jr. ("Dunham") owns several parcels of land adjacent to the Project site that will be directly and substantially impacted by the Property, as follows:

a) <u>195 Candlewood Mountain Road</u>. Dunham owns real property and improvements at 195 Candlewood Mountain Road in New Milford, on which his

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primary residence is located ("195 Candlewood Mountain Road"). The property will be directly and injuriously affected by the Project in one or more of the following ways:

(1) 195 Candlewood Mountain Road abuts the western border of the Project area, and is directly downslope from the area to be clear cut for the solar panels. The panels will be approximately 100 to 150 feet from the property, and will be visible to anyone looking out the back door of the residence.

(2) 195 Candlewood Mountain Road has a large pond in the back (eastern portion of the Property). The potential erosion and sedimentation from the Project area directly uphill (the prevention of which erosion was inadequately documented and planned for by Candlewood Solar) will result in deposits of soil and other sediments onto the property and into the pool.

(3) 195 Candlewood Mountain Road's southern boundary abuts the proposed access road that will be used by heavy trucks and other vehicles to transport the logs from the clear cutting as well as the solar array panels, and thereafter by trucks and other vehicles used to operate and maintain the Project. Dunham will be directly affected by the noise, visibility, dust and other deleterious effects of the creation and use of the access road.

(4) The proposed construction staging area for the Project is on a five-acre parcel that abuts the access road to the south and will be clearly visible from 195 Candlewood Mountain Road. The Final Order and Decision recommends that Candlewood Solar consider placing some of the solar panels in this area in order to reduce the amount of core forestland to be destroyed. If the panels are placed there they will be clearly visible from the property.

(5) All of the above activities and uses will directly and injuriously affect Dunham's use and enjoyment of 195 Candlewood Mountain Road and reduce the property's value.

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b) 214 Candlewood Mountain Road. Dunham owns an approximately 600 acre parcel of land on the east and west side of Candlewood Mountain Road ("214 Candlewood Mountain Road"). This parcel abuts the Project area from the north, south and west, and has several uses which will be negatively impacted by the Project in one or more of the following ways:

(1) Twenty-five acres of this parcel is in the Town's B-3 zone and includes an event and wedding center, a bed and breakfast inn, and a horse farm and stable (for boarding and riding lessons). The solar array will be visible in various parts of the year to users of the facilities, which are prized for their scenic and unspoiled views. The Project will adversely affect the use of the property for weddings and events and as a bed and breakfast, because of the potential visibility to users of the property of the enormous swath of the solar panels to be erected. An adverse impact to these businesses, which depend heavily on the rural and scenic nature of the property, will result in diminution of the property's value. The petition for the Project has already caused a decline in requests for use of these facilities.

(2) The remainder of the 600 acres is mostly zoned for single-family residential uses. It is partially forested with trails that are used year round for hiking, fishing, and horse-back riding. About 55 acres of this remaining part of the property is in the Town's Airport Zone, and contains a heliport. The property also has an easement over the Candlelight Farms Property to the west that allows for use of the Airport by Dunham and his invitees. The glare from the solar panels will or may pose a danger to the small aircraft that use the heliport as well as the Airport, and thus threatens the commercial viability of the use of the portion of the property in the Airport Zone for related airport uses, with a consequent diminution in property value.

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c) Plaintiffs Lisa K. Ostrove and Michael H. Ostrove own real property at 175 Candlewood Mountain Road, which is their residence ("Ostrove Property"). The Ostrove Property borders the Project's western boundary, and is located directly downhill from the proposed area of the solar array panels. The panels will or may be located 50 feet or less from the Ostrove Property, and will be visible throughout the year. The Ostrove Property also contains a large pond in the backyard (eastern portion). The potential erosion and sedimentation from the Project, which is very close to and directly uphill from the Ostrove Property (and the prevention of which erosion was inadequately documented by and planned by Candlewood Solar), will or may result in deposits of soil and other sediment directly onto the Ostrove Property and into the pond. The closeness and visibility of the Project from the Ostrove Property and the potential damage to it from erosion will directly and injuriously affect the Ostrove's use and enjoyment of the Ostrove Property and will cause a diminution in its value.

d) Accordingly, Rescue members McClinch, Dunham, and Lisa and Michael Ostrove are aggrieved by the Final Decision and Order and thus would have standing to bring this appeal in their own right. Rescue therefore has standing to bring this appeal on their behalf.

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28. The allegations recited above also demonstrate that plaintiffs Candlelight Farms and Lisa and Michael Ostrove are aggrieved by the Final Decision and Order.

SECOND COUNT (C.G.S. § 22a-19)

1. Plaintiffs hereby repeat and realiege paragraphs 1 through 28 of the First Count as if fully set forth herein.

29. For the reasons set forth in paragraphs 24-26, the Project is likely to unreasonably impair the public trust in the natural resources of the state, including but not limited to core forestland, wetlands, watercourses, wildlife, and wildlife habitat, and the visual quality of the environment.

30. Because the Siting Council granted Rescue's application to intervene in the Petition proceeding pursuant to C.G.S. § 22a-19, Rescue has statutory standing to bring this appeal from the Final Decision and Order to pursue the issues of the impact of the Project on the specified natural resources of the state.

31. Plaintiffs Candlelight Farms and Lisa and Michael Ostrove are also aggrieved by the Final Decision and Order and thus have standing to pursue the issues of the impact of the Project on the specified natural resources of the state pursuant to C.G.S. § 22a-19.

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WHEREFORE, PLAINTIFFS CLAIM:

1. A judgment of the Court reversing the Final Decision and Order of the Siting Council and directing the Siting Council to deny the Petition;

2. Statutory costs;

3. Reasonable attorney's fees as may be authorized by law; and

4. Such other relief as the Court may deem fair and equitable.

PLAINTIFFS,
RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE F/K/A LISA J. OSTOVE, MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC

By: _____
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PLAINTIFF'S VERIFICATION

I, Liba Furhman, a member of Plaintiff Rescue Candlewood Mountain, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kreloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

Liba Furhman

Subscribed and sworn to before me this 1st day of February, 2018.

Notary Public
My Commission Expires:

Kelly Simpson
Notary Public-Connecticut
My Commission Expires
May31, 2021

PLAINTIFF'S VERIFICATION

I, Lisa K. Ostrove, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kreloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

Lisa K. Ostrove

Subscribed and sworn to before me this 1st day of February, 2018.

Notary Public
My Commission Expires:

Kelly Simpson
Notary Public-Connecticut
My Commission Expires
May31, 2021

PLAINTIFF'S VERIFICATION

I, Michael H. Ostrove, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kreloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

Michael H. Ostrove

Subscribed and sworn to before me this 1ST day of February, 2018.

Notary Public
My Commission Expires: 01/17/2020

MICHAEL FRANCIS CREED 2/1/18
Notary Public - State of New York
NO. 01CR6254579
Qualified in New York County
My Commission Expires Jan 17, 2020

PLAINTIFF'S VERIFICATION

I, Terry McClinch, sole member of Plaintiff Candlelight Farms Aviation, LLC, declare under penalty of perjury under the laws of the State of Connecticut that I have reviewed the attached Appeal of Rescue Candlewood Mountain, Lisa K. Ostrove (f/k/a Lisa J. Kraloff), Michael H. Ostrove, and Candlelight Farms Aviation, LLC versus Connecticut Siting Council and Candlewood Solar, LLC, and the allegations are true to the best of my knowledge, information and belief.

CANDLELIGHT FARMS AVIATION, LLC

By: _____
Terry McClinch, Its Sole Member

Subscribed and sworn to before me this 31 day of February, 2018.

SEAL

JASON SCHUMACHER
NOTARY PUBLIC for the
State of Montana
Residing at Dillon, Montana
My Commission Expires
December 02, 2019

_____
Notary Public
My Commission Expires: December 02, 2019

RETURN DATE: MARCH 6, 2018 : SUPERIOR COURT

RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE F/K/A LISA J. OSTROVE, MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC : JUDICIAL DISTRICT OF NEW BRITAIN

v.

: AT NEW BRITAIN

CONNECTICUT SITING COUNCIL AND CANDLEWOOD SOLAR, LLC : FEBRUARY 1, 2018

STATEMENT OF AMOUNT IN DEMAND

The Plaintiffs' claim for relief is of a non-monetary nature.

PLAINTIFFS,
RESCUE CANDLEWOOD MOUNTAIN, LISA K. OSTROVE F/K/A LISA J. OSTOVE, MICHAEL H. OSTROVE, AND CANDLELIGHT FARMS AVIATION, LLC

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EXHIBIT A

RCM Membership List

Kathleen Roberts Ford Joachim, Doug Joachim, Pam Morgan, Pat Welch, Russ Posthauer, Jr. , Page Carter , Sue Carter ,Carl Dunham ,Nancy Saggese, Helen Applebaum , Debra Schueler , Jamie Diaferia, Susan Diaferia, Dom Diaferia, Melissa Pezzola ,Michael Merrill , Donald Pezzola , Gregory Maroun , Stecks Nursery and Landscaping , Albert Watson, Elizabeth Watson, Sue Randolph, Steve Randolph Alice Miller , Iiana Laurence, Patricia Laurence, Stuart Laurence, Jonathan Laurence Donny Pezzolo Jr , Katie Pezzolo , Kyle Kovacs , Kelly Kovacs, David Kellogg Devon Dobson, Kelsey Dobson, Phil Dobson, Tom Dobson, Lisa Molsan, Kat Benzova Michael Patzig, Liba Furhman, Ari Rosenberg, Lisa Ostrove , Michael Ostrove, Sophie Ostrove, Daniel Ostrove, John Macklin ,Tamar Macklin, Jennifer Shelov, Josh Shelov Sarah Dillon, Andrew Havill , John Havill, Janet Levy , Ross Levy, Nancy Macklin Robert Macklin, Michael Scofield, Jay Umbarger , Lynn Umbarger, Naomi Goldstein Paula Goldstein, Marty Fridson, Elaine Sisman, Nill Baider, Alberto Baider Daniella Baider, Allegra Baider, Larry Thaler, Sherry Thaler, Julie Bailey ~~Bob Bailey, Norma Hart, Troy Hart, Barbara Stasiak, Jim Stasiak, Karin Shelov~~ Beth Shelov, Mark McCloskey , Jacquie McCloskey, Chris McCloskey, Brian Tivnan Candlelight Farms Aviation LLC , Terry McClinch , Sven Olsen, Mary Olsen Kirsten Torraco, Michael Torraco, Gary Hida, Lisa Hida, Eileen F Barber, John Barber Lawrence Lombardo, Kathryn Joleen Lombardo, Robert Carrozzo, Cheryl S Gould Tom Castagnetta, San Castagnetta, Dan Castagnetta, Ron Sypher, Barbara Sypher Nancy Walsh, Tima Winkley, Kenneth Winkley, Eli Noam, Nadine Strossen

EXHIBIT B

STATE OF CONNECTICUT
SITING COUNCIL

PETITION NO. 1312 - Candlewood Solar LLC petition for a declaratory ruling that no Certificate of Environmental Compatibility and Public Need is required for the proposed construction, maintenance and operation of a 20 megawatt AC (28.6 megawatt DC) solar photovoltaic electric generating facility located on a 163 acre parcel at 197 Candlewood Mountain Road and associated electrical interconnection to Eversource Energy's Rocky River Substation on Kent Road in New Milford, Connecticut.

SEPTEMBER 6, 2017

APPLICATION TO INTERVENE UNDER CEPA, §22a-19, §4-177a AND §16-50n

Rescue Candlewood Mountain ("RCM"), a voluntary association, is a coalition of Greater New Milford and Sherman residents that hereby move and petition the CSC to become a party intervenor in the above application by Candlewood Solar LLC petitioning the Council for a declaratory ruling that no certificate of environmental compatibility and public need is required for a 20 megawatt solar photovoltaic power generating facility on Kent Road in New Milford, Connecticut. The purpose of the intervention is to participate in these proceedings to prevent unreasonable impact to the natural resources of the State including scenic vistas, economic loss to neighboring property interests, loss and/or fragmentation of habitat, the unreasonable loss of farm/forest land and the use of inadequately narrow vegetated buffers along the project boundaries.

Pursuant to Conn.Gen.Stat. §22a-19 ("CEPA"), §16-50n and §4-177a, the RCM seeks party status as an entity which has a direct interest in the proceedings which will be specifically and substantially affected as it is a voluntary association consisting of taxpayers and citizens of the host town of New Milford and the neighboring town of Sherman including Lisa Ostrove whose property abuts the project site. The members of the group are likely to suffer property value loss different from and greater than that of the public in general due to the proximity of the facility to their homes. In addition, the group seeks to protect the scenic vistas in New Milford and Sherman generally on behalf of the general public. Intervenor seeks party status in the above proceedings for the purpose of submitting testimony, briefs and other evidence relevant to the consideration of the application under consideration; specifically the mitigation of environmental impact to scenic vistas by relocation, increased site buffers, alternative siting configurations and other best management practices for the conservation of natural resources.

Intervenor's participation will be in the interests of justice and is proper under CEPA in that the evidence and testimony to be given will tend to show that the proposed activity for which Applicant seeks a certificate is likely to unreasonably harm the public trust in the air, water or other natural resources of the State of Connecticut in that, if

granted, the proposed facility will, inter alia, unreasonably impair the visual quality of the environment and the naturally occurring core forests in and about Candlewood Mountain and surrounding area; and is reasonably likely to cause viewshed and habitat deterioration that is unreasonable because alternatives to the petitioner's proposal exist which would result in lesser impact.

In support of this application, the movant states the following:

- Rescue Candlewood Mountain is a duly constituted Connecticut voluntary association with members who enjoy the scenic views in and about the area of the proposed facility on Candlewood Mountain.
- The proposed power generation facility will have a negative impact on the scenic vistas and natural resources in New Milford and Sherman by clear-cutting 72 acres of core forest in addition to 16 acres of which is farmland, a loss of approximately fifteen thousand trees.
- RCM intends to submit evidence to the record which has not been previously considered in the form of expert testimony which will substantiate the feasibility of available alternatives to the proposed facility of lesser visual impact which will assist the Council in complying with its mandate to minimize impact as required by C.G.S §16-50g and 16-50p(3)(G)(b)(1).
- The design does not incorporate the best available technology for reducing the visual impacts (glare and the view of the facility itself) of the facility in that it fails to fully consider impacts to scenic views, natural habitats and neighboring property uses, including nearby scenic trails and nearby homes.

DISCUSSION OF LAW

The Council must be mindful of the statutory requirements which apply to interventions under CEPA. The bar is quite low for filing an intervention and thus §22a-19 applications should not be lightly rejected. *Finley v. Town of Orange*, 289 Conn. 12 (2008) (an application need only allege a colorable claim to survive a motion to dismiss) citing *Windels v. Environmental Protection Commission*, 284 Conn. 268 (2007).

CEPA clearly and in the broadest terms indicates that any legal entity may intervene. This includes municipal officials, *Avalon Bay Communities v. Zoning Commission*, 87 Conn. App. 537, 867 A.2d 37 (2005).

An allegation of facts that the proposed activity at issue in the proceeding is likely to unreasonably impair the public trust in natural resources of the State is sufficient. *See, Cannata v. Dept. Of Environmental Protection, et al*, 239 Conn. 124 (1996)(alleging harm to floodplain forest resources).

The Connecticut Appellate Court has noted that statutes "such as the EPA are remedial in nature and should be liberally construed to accomplish their purpose." *Avalon Bay Communities, Inc. v. Zoning Commission of the Town of Stratford*, 87 Conn.App.537 (2005); *Keeney v. Fairfield Resources, Inc.*, 41 Conn. App. 120, 13233, 674 A.2d1349 (1996). In *Red Hill Coalition, Inc. V. Town Planning & Zoning Commission*, 212 Conn. 7272, 734, 563 A.2d 1347 (1989) ("section 22a-19[a]makes intervention a matter of right once a verified pleading is filed complying with the statute, whether or not those allegations ultimately prove to be unfounded"); *Polymer Resources, Ltd. v. Keeney*, 32 Conn. App. 340, 346-49, 629 A.2d 447 (1993) ("[Section] 22a-19[a] compels a trial court to

permit intervention in an administrative proceeding or judicial review of such a proceeding by a party seeking to raise environmental issues upon the filing of a verified complaint. The statute is therefore not discretionary.") *See Also, Connecticut Fund for the Environment, Inc. v. Stamford*, 192 Conn. 247, 248 n.2, 470 A.2d 1214 (1984).

In *Mystic Marinelife Aquarium v. Gill*, 175 Conn. 483, 490, 400 A.2d 726 (1978), the Supreme Court concluded that one who filed a verified pleading under § 22a-19 became a party to an administrative proceeding upon doing so and had "statutory standing to appeal for the limited purpose of raising environmental issues." "It is clear that one basic purpose of the act is to give persons standing to bring actions to protect the environment." *Belford v. New Haven*, 170 Conn. 46, 53-54, 364 A.2d 194 (1975).

The Intervenor is entitled to participate as a §22a-19 intervenor which allows for a right of appeal under that statute. *Committee to Save Guilford Shoreline, Inc. v. Guilford Planning & Zoning Commission*, 48 Conn. Sup. 894, 853 A.2d 554(2004) once any entity has filed for intervention in an administrative proceeding, it has established the right to appeal from that decision independent of any other party. *Mystic Marinelife Aquarium v. Gill*, 175 Conn. 483 (1978) stated quite clearly that "one who files a §22a-19 application becomes a party with statutory standing to appeal." *Branhaven Plaza, LLC v Inland Wetlands Commission of the Town of Branford*, 251 Conn. 269, 276, n.9 (1999) held that a party who intervenes in a municipal land use proceeding pursuant to §22a-19 has standing to appeal the administrative agency's decision to the Superior Court. The Court cited as support for this proposition, *Red Hill Coalition, Inc. v. Conservation Commission*, 212 Conn. 710, 715, 563 A.2d 1339 (1989)("because the [appellants] filed a notice of intervention at the commission hearing in accordance with §22a-19(a), it doubtless had statutory standing to appeal from the commission's decision for that limited purpose.")

In *Keiser v. Zoning Commission*, 62 Conn. App. 800, 803-804 (2001) our Appellate Court stated that the *Branhaven Plaza* case is directly on point and held "the plaintiff in the present case properly filed a notice of intervention at the zoning commission hearing in accordance with §22a-19(a). Accordingly, we conclude that he has standing to appeal environmental issues related to the zoning commission's decision."

The rights conveyed by CEPA are so important and fundamental to matters of public trust that the denial of a 22a-19 intervention itself is appealable. See, *CT Post Limited Partnership v. New Haven City Planning Commission*, 2000 WL 1181131 Conn. Super. (Hodgson, J. 2000)(§22a-19 intervenors may file an original appeal for improper denial of intervenor status).

Intervenors' application for intervenor status should be granted so that it may participate by presenting evidence for the record and meaningfully assist the Siting Council in reaching a decision which minimizes impact to natural resources of the state while balancing the public need for responsible renewable energy sources..

VERIFICATION

The undersigned, Lisa Ostrove, duly authorized Director of Rescue Candlewood Mountain, duly sworn, hereby verifies that the above application is true and accurate to the best of her knowledge and belief.

Lisa K Cohne

Sworn and subscribed before me this 5th th day of September, 2017

Notary Public; My Commission Expires August 7, 2021

GENA M BATTALIA
Notary Public - State of New York
NO. 01BA6362886
Qualified in New York County
My Commission Expires Aug 7, 2021

Respectfully Submitted,
Rescue Candlewood Mountain,

By
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The intervenor requests copies of all filings made in the course of this docket to date and from this date forward and requests service by electronic mail.

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was deposited in the United States mail, first-class, postage pre-paid this 6th day of September, 2017 and addressed to:

Ms. Melanie Bachman, Executive Director, Connecticut Siting Council, 10 Franklin Square, New Britain, CT 06051 (1 orig, 15 copies, plus 1 electronic) (US Mail/ electronic).

And electronic copies to:

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Keith R. Ainsworth, Esq.

EXHIBIT C

IN THE MATTER OF:

DEVELOPMENT AND MANAGEMENT PLAN
PROPOSED 20-MW SOLAR PHOTOVOLTAIC PROJECT
CANDLEWOOD MOUNTAIN ROAD
NEW MILFORD, CONNECTICUT
CANDLEWOOD SOLAR, LLC – APPLICANT
MMI #1481-57-01

AFFIDAVIT

STATE OF CONNECTICUT)
) **ss: Cheshire**
COUNTY OF NEW HAVEN)

Ryan McEvoy, Edward A. Hart, and Vincent C. McDermott, being duly sworn, depose and say the following:

1. We are members of Milone & MacBroom, Inc., a professional engineering, landscape architecture, and environmental science firm with its principal office in Cheshire, Connecticut.

2. Ryan McEvoy and Edward A. Hart are professional engineers licensed to practice in the State of Connecticut and by our experience are qualified to review the Development and Management (D&M) Plan for the above-referenced project as such plan relates to site development, stormwater management, erosion and sedimentation control, and similar construction activities. Vincent C. McDermott is a landscape architect licensed to practice in the State of Connecticut and by his experience is qualified to review the D&M Plan for the above-referenced project.

3. The Town of New Milford has engaged Milone & MacBroom, Inc. to review the D&M Plan submitted on behalf of Candlewood Solar, LLC (Candlewood) by Wood Environmental and Infrastructure Solutions, Inc. dated January 14, 2019. This review focuses on the impacts on the environment from the proposed development by comparing the representations made by the petitioner during the proceedings leading to the December 21, 2017, Decision and Order (D&O) by the Connecticut Siting Council (CSC), and the conditions of approval in the D&O to the refined site plans and engineering presented in the D&M Plan. More specifically, this review addresses the following:

   3.1 Adequacy of the Final Site Plans (Appendix B) to provide a responsible contractor to interpret the plans and to construct the improvements and to allow CSC to verify that the improvements have been constructed in accordance with the plans

3.2 Adequacy of the Erosion and Sedimentation Control Plan included in Appendix B and described further in the Stormwater Pollution Control Plan (Appendix D) for consistency with the Connecticut Department of Energy & Environmental Protection (CTDEEP) *2002 Connecticut Guidelines for Erosion and Sedimentation Control* including but not limited to seeding the site for stabilization purposes prior to installation of racking systems and panels

3.3 Consistency of the Stormwater Management Plan with the CTDEEP *2004 Connecticut Stormwater Quality Manual*, including an analysis on the potential impact of driveways on stormwater flows including but not limited to potential diversion of stormwater away from wetlands

3.4 Adequacy of the site clearing, grubbing, stabilization, and stormwater controls phasing plan

3.5 The consistency of the plans with the recommendations from CTDEEP outlined in "Stormwater Management at Solar Farm Construction Projects" dated September 8, 2017

4. The Candlewood Solar project will be constructed on a large site. The portion of the site where construction is proposed has steep slopes that average 10% to 15% with some slopes as steep as 25%. The underlying soils are compact upland soil formed over glacial till, typical of what is found on the hillsides elsewhere in New Milford. The soil infiltration rates for these soils are classified by the Natural Resources Conservation Service as being slow to very slow. They are also prone to erosion due to being fine grained. There are several special wetlands on the property including three vernal pools as well as state special concern and threatened amphibians that are sensitive to water quality impacts. There are no construction activities proposed directly in the wetlands, but there are activities in the upland review area that could impact/impair water quality. Except for a small area of hayfields, construction will occur in wooded areas of the property. Overall, approximately 83 acres will be disturbed, and approximately 54 acres of core forest land will be clear-cut to allow for the installation of the solar array and the transmission line connecting to the Rocky River substation east of the site.

5. The plans submitted to the CSC as part of the D&M Plan are represented as being "For Construction." The plans are not suitable for construction, in our opinion, because they lack detail specific to the conditions on this subject site, are not adequate to allow a responsible contractor to implement the improvements in the field, and allow CSC to verify that the improvements have been constructed in accordance with the approved plans. Note the following:

5.1 Based on our experience with the design of similar facilities, it is customary engineering practice to provide site layout plans with appropriate dimensions showing the precise limits of clearing and the location of all improvements, grading plans having 2-foot contour intervals showing existing and proposed finished grades including what will be beneath the solar arrays, and detailed drainage plans showing the precise slope sizes and inverts of pipes and other structures. This information is

in addition to the required Erosion and Sedimentation Control Plans. Without having refined plans, the impacts of the proposed development cannot be adequately assessed.

5.2 The project calls for the clearing and grubbing of the site in order to install the solar arrays, access drives, and other related facilities. However, except for some drainage swales and other drainage improvements located on the perimeter of the disturbed site (83.4 acres), there are no grading plans that show how the topography will be regraded once the existing vegetation and stumps have been removed and prior to restoration and the implementation of site improvements.

5.3 The site construction details included in the plans are generic, accompanied by standard tables. The critical details related to drainage structures have not been customized to be applied to this site and rely on field interpretation during construction.

5.4 In reviewing other solar installations and based on our experience, the ratio between the panels and the space between arrays should be approximately 50/50 to facilitate adequate maintenance and provide for sunlight for the vegetation to grow beneath the panels. The plans show that the solar arrays are separated by aisles having a width as narrow as 5 feet, which is too narrow to allow maintenance and promote a healthy vegetative community. Moreover, it will cause the vegetation in the aisles and beneath the panels to be shaded, thus affecting the long-term sustainability and quality of the vegetation.

6. The stormwater analysis presented by the applicant is fundamentally flawed as noted below:

6.1 The plans are based on outdated rainfall data. Both CTDEEP and the Connecticut Department of Transportation (CTDOT) require the use of rainfall precipitation data from National Oceanic and Atmospheric Administration (NOAA) Atlas 14, not TP-40. (See Appendix B in Chapter 6 of the *2000 DOT Drainage Manual*, as undated on the DOT webpage, now referencing NOAA Atlas 14 Volume 10.) The NOAA Atlas 14 rainfall data is 15% to 20% higher than the old data in TP-40 and would have a significant impact on the outcome of the modeling and the actual design.

6.2 The *HydroCAD* model output provided in the Stormwater Pollution Control Plan indicates the use of infiltration in the design of the proposed sand filters. However, it does not appear that in-situ soil testing has been performed to determine if surface sand filters are an acceptable stormwater practice for the site.

6.3 The CTDEEP *Stormwater Quality Manual* provides guidelines for stormwater filtering practices that have not been followed in the proposed design. The manual states that filtering practices are designed as offline systems to treat the water quality volume and bypass larger flows. Also, the manual recommends the Water Quality Volume should be diverted into a pretreatment sediment forebay or settling chamber

to reduce the amount of sediment that reaches the filter. (See Filtering Practices in Chapter 11 of the *2004 DEEP Water Quality Manual*, page 11-P4-1) The proposed design directs all of the runoff to the surface sand filter with no pretreatment. The manual contains a list of the limitations of stormwater filters that pertain to the proposed design: 1) Pretreatment is required to prevent filter media from clogging; 2) Frequent maintenance is required; 3) Surface sand filters are not feasible in areas of high groundwater; 4) Surface sand filters should not be used in areas of heavy sediment loads; 5) Surface sand filters provide little or no stormwater quantity control; and 6) Surface and perimeter filters may be susceptible to freezing. The design of the proposed stormwater management needs to be designed with greater attention to site conditions.

6.4 It is appropriate to assume a meadow coverage condition for the proposed conditions *HydroCAD* model only if continuous vegetation is permanently established and maintained under the solar panels. However, it is expected that the new vegetation will struggle to grow under the panels due to the density, size, and short height of the panels in relation to the ground. The only possible portion of the site where the arrays are proposed that could have a continuous meadow coverage would be the open space in between the panel rows that are illustrated to be as narrow as 5 feet. The hydrologic computations need to be revised to assume a poorer ground coverage under the proposed solar panels. This is likely to result in the need for stormwater detention that is not part of the plans as now presented.

6.5 The postdevelopment peak discharge rates for Points of Analysis 5 and 6 show an increase from the predevelopment conditions. A technical explanation as to why these increases will not cause negative impacts downstream has not been provided.

6.6 At present, much of the runoff from the western portion of the site that drains to abutting properties to the west does so in an even, shallow, concentrated flow. The introduction of the spillway outlets will result in runoff being consolidated and concentrated in a few distinct locations. This will fundamentally change the nature of the discharge from the subject parcels and could result in long-term risk of erosion and damage to downgradient parcels. This condition also exists on the eastern side of the parcel where runoff is concentrated and not spread out in a manner more consistent with existing conditions.

6.7 Design computations for the drainage swales and culverts have not been provided to demonstrate that they are adequately sized to convey the contributing stormwater runoff.

6.8 There are no supporting calculations demonstrating the velocity of runoff that is expected at the outlets of the basins.

6.9 The use of sheet flow in the time of concentration calculations where solar panels are proposed is not a reasonable expectation given the concentrated nature of the runoff

from the panels themselves. The runoff generated from the drip line of the panels will travel downgradient in a manner more consistent with shallow, concentrated flow.

6.10 The grading of the driveway from Candlewood Mountain includes riprap swales along both sides of the road, with runoff directed to sand filter 7C. The uphill swale appears to simply discharge across the driveway to the sand filter. The uphill swale in particular is likely to convey significant flows that will cause erosion across the driveway in an unprotected manner. Also, there does not appear to be any supporting calculations on the design of the roadside or other swales on site.

6.11 The roadway swales ultimately discharge into two 18-inch culverts beneath the driveway that will channelize the flow and result in point discharges that currently do not occur on site. Also, the 18-inch culvert along the road is shown within the town right-of-way, requiring approval from the New Milford Public Works Department. Calculations for the 18-inch culverts have not been provided.

6.12 The riprap spillway depth is not specified for the sand filter details. Assuming that the outflow from the spillway is calculated to begin at the crest and not the bottom of the riprap, the basins will begin to drain at the interface between the earth embankment and the bottom of the riprap, significantly reducing the effective storage within the basins.

6.13 The berms of the sand filters are shown at a 2:1 slope. Recommended slopes on constructed berms generally require an average slope of 2.5 between the inside and outside slopes of the berm.

6.14 Sand filter 7C does not include a berm as shown in the calculations and merely drains from elevation 726 to 724.

6.15 The plans call for a narrow sand filter strip within the bottom of some sand filter basins. The soil media should be placed within the entire bottom of the sand filters.

6.16 Water quality basins 2A, 2B, 4A, and 4B are proposed on existing grades approaching 25%, resulting in significant grading along the property line. These basins need to be relocated upgradient to flatter existing slopes that are more suitable for construction of stormwater control features.

6.17 Portions of the site grading, drainage, and site improvements are shown directly against property lines and the town right-of-way. The submitted documents indicate that the property lines are based on tax maps and not based on surveyed property lines. Assessor's mapping is approximate and should not be used as a basis for design of construction plans particularly when activity is proposed right up to a property line. An A-2 boundary survey should have been completed prior to submission of the Stormwater General Permit application.

6.18 The grading plan for basin 1A requires the installation of a constructed berm that will impound stormwater up to a couple feet in depth beneath portions of the solar panels. Based on the limited area of sand filter that is shown only in a small portion of the area impounded by the basin nearest to the eastern berm, extended periods of standing water may exist beneath panels after a rainstorm.

7. The phasing plan described in the Stormwater Pollution Control Plan (Appendix D) is simplistic and does not adequately address the potential erosion and sedimentation that should be anticipated from the disturbance of 83.4 acres (see Section 2.1 in the Stormwater Pollution Control Plan) on a steep hillside. Note the following:

7.1 The plans do not clearly show how no more than 5 acres at a time will be disturbed before stabilization and prior to the installation of the panels.

7.2 The plan states that the solar array will be installed after vegetative cover is "initiated," but there is no metric for determining when the soil has been stabilized.

7.3 The plans call for the clear-cutting of trees as one continuous operation, leaving the stumps in place. Such forest operations can cause soil erosion, but the applicant is not proposing to install erosion control measures until after the clearing operation is finished.

7.4 The second phase of the operation calls for the grubbing (removal of stumps) to be done in 5-acre increments, but the locations of those "plots" have not been clearly defined; this will be left to field survey at the time of construction. Furthermore, the method of grubbing has not been presented. If not performed with appropriate equipment, there is likely to be a loss of topsoil and an increase in the potential for erosion on the steep slopes. It appears from the plans that it is the applicant's intention to perform the operations in a continuum rather that in discrete and separate disturbance plots that will allow for separation of the disturbed areas and for vegetation to become established.

7.5 Temporary seeding is proposed in areas that will be disturbed by subsequent construction activity with permanent seeding occurring at a later time. It is not clear how, when, and where permanent seeding will occur.

7.6 It is not appropriate to assume that once germination occurs that the land is stabilized and the 5-acre phase is ready for the installation of foundations. It is our experience on sites where grass needs to be established prior to having activity on the site that it takes a substantial period of time before sod becomes adequately established. Permanent seed, which should include drought- and shade-tolerant species, takes 3 weeks or so to germinate and takes months, not weeks, to develop a root system that can withstand traffic. The actual time for turf establishment depends on the time of year that seed is placed, temperature, and moisture. The turf

needs to be mowed to promote density. In this instance, we would expect a full growing season for the grass to become fully established.

7.7 As described in the plan, the foundations for the solar arrays will be ground screws that, in our experience, are installed using a skid-steer vehicle (a Bobcat). The movement of such equipment will tear apart the grass, likely resulting in erosion unless the grass is fully established.

7.8 The phasing plan attempts to break up the stabilization and construction of the site based on contributing watersheds. This does not seem to be a practical means to construct the improvements, particularly given the potential of subwatersheds being changed or modified as a result of ongoing construction activities. Sediment control measures including sediment traps and diversion swales should be installed and in place in phases immediately adjacent to phases that are under active construction to ensure that downgradient protections are in place should the topography not precisely match what is shown on the plans or if construction activities divert runoff across the estimated watershed limits.

7.9 The temporary sediment traps (TST) are shown on the plans in the identical manner that sand filter/water quality basins are shown. The supporting calculations shown on the details sheets include bottom elevations of the TSTs that are up to 3 feet below the *bottom* of the sand filter, well below the finished grade. The sediment and erosion control plans should reflect the grading of the TSTs shown in the supporting calculations.

7.10 Long slopes several hundred feet in length (as much as 700 feet) with average slopes exceeding 10% of disturbed, exposed soil are proposed prior to any sediment control measures. Unprotected long and steep slopes represent a significantly high risk of erosion. Long, steep slopes are required to be broken up by benching, terracing, or diversions to avoid erosion problems (pages 3 through 7 of the *2002 Connecticut Guidelines for Erosion and Sediment Control*). Detailed site grading plans should be provided to show these site modifications.

7.11 The sediment barrier shown on the perimeter of the site will channelize and direct runoff to the low points along the slope, concentrating runoff from sediment trap outlets. The sediment barrier/silt fence locations need to be placed in a manner that will not result in channelizing the discharge from the basins.

712 Soil stockpile locations are not shown.

7.13 Much of the clearing and installation of overhead wires occurs on a slope that exceeds 25% in grade. While the activities proposed in that area are intended to be minor in nature, disturbed soil on a slope this steep will require temporary diversions and at least temporary erosion control matting to allow for vegetation to become established.

7.14 There are no long-term stabilization measures shown along the drip line of the panels. Particularly in areas exceeding 10% in grade, there exists the potential for erosion of the soil, which over time will result in increased sediment loads to downgradient areas.

8. The document prepared by CTDEEP entitled *Stormwater Management at Solar Farm Construction Projects* includes clarification on procedure, design goals, and construction monitoring requirements that reiterate the goals of design documents referenced in Comment 3 above. The submitted documents fail to adhere to the recommendations of CTDEEP guidelines as noted below:

8.1 The CTDEEP document requires that the methods of "*an approvable SWPCP will include methods for avoiding compaction of soils, disconnection of and reduction of runoff..., avoidance of concentration of stormwater, and other measures necessary to maintain or improve pre-construction hydrology conditions.*" For the reasons stated in Comment 6, it is our opinion that the postconstruction hydrology will degrade and exacerbate preconstruction hydrology.

8.2 The CTDEEP document requires that the design professional be well versed in erosion and sedimentation guidelines, particularly Chapter 4 for large construction sites. For the reasons we stated in Comment 7, the D&M Plan does not meet these criteria.

8.3 The document states "an approvable SWPCP shall include, but not be limited to, the location of all erosion, sediment and stormwater control measures including detailed design cut sheets with supporting calculations, construction means and methods, project phasing (i.e. site planning pre-construction, construction, and post-construction stabilization, etc.), construction sequencing and a construction schedule." For the reasons stated in Comment 7, the phasing plan lacks sufficient detail, and the timing of construction activities will result in large tracts of disturbed land with a lack of mature vegetation needed to limit the potential for transport of sediment during construction.

9. In summary, the plans submitted to the CSC as part of the D&M Plan are inadequate and lack the necessary information to assure that there will not be erosion and sedimentation caused by the construction activities that could impact the waters of the stated as noted below:

9.1 Contrary to representations made by the petitioner, the hydrology of the site will be permanently altered and will impact adjoining properties.

9.2 The Candlewood Solar project should be distinguished from other projects that come before the CSC. Whereas transmission line projects, for example, disturb land in a linear manner where impacts from erosion and sedimentation are manageable and stabilization can occur quickly, the Candlewood Solar project will require the clearing,

grubbing, and regrading of a large block of land on steep slopes where it will be difficult to manage impacts.

9.3 The establishment of grass cover adequate to prevent long-term erosion will require regrading of the site prior to seeding. The time that it will take to achieve well-established grass should be measured in months, not weeks. By developing the site in "rolling" 5-acre increments without establishing thick turf before installing the solar arrays is highly likely to cause both short-term and long-term erosion and sedimentation.

9.4 The density of the solar arrays will severely restrict sunlight to the grass beneath the panels and make it very difficult to maintain the grass that will allow for its long-term health.

9.5 If the CSC requires the petitioner to modify and resubmit the plan and supporting documents in accordance with the foregoing comments, it is quite possible that the configuration of the solar arrays will need to be modified and further reduced in number.

MILONE & MACBROOM, INC.

Ryan McEvoy, PE
Lead Project Engineer, Civil
Cheshire, Connecticut

2/27/2019
Date

Edward A. Hart, PE, Vice President
Director of Civil Engineering
Cheshire, Connecticut

2-27-2019
Date

Vincent C. McDermott, FASLA, AICP,
Senior Vice President
Cheshire, Connecticut

Feb. 26. 2019
Date